SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, ET AL., PETITIONERS,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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[fol. 2]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law. No. 82771

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and The Kansas City Southern Railway Company, Relators,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent

PETITION—Filed May 31, 1933

To the Supreme Court of the District of Columbia:

Now comes the relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company and respectfully show to the court:

(1) The relator, Chicago Great Western Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Illinois and having its principal office and place of business in Chicago, in the State of Illinois. The relator, The Kansas City Southern Railway Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business at Kansas City, in the State of Missouri.

(2) Both of the relators are common carriers, engaged in the transportation of persons and property in interstate commerce between points in various states of the United States and, as such, are subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce" and Acts amendatory thereof and supplemental thereto, including the Transportation Act, 1920, and various other Acts of Congress designed to regulate interstate commerce. Each of said relators owns and operates a line of railroad to the City of Kansas City,

Missouri. The lines of railroad of relators connect at Kansas City, Missouri, with the railroad of the Kansas City Terminal Railway Company (hereinafter called the Terminal Company.)

[fol. 3] (3) The respondent, Interstate Commerce Commission (hereinafter called the Commission), is a commission created by the Act to Regulate Commerce and charged with certain duties thereunder and under other Acts enacted by Congress and relating to such interstate commerce.

(4) The Terminal Company is a railroad corporation organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business at Kansas City, in the State of Missouri. It was incorporated in 1906 for the purpose of acquiring, constructing, owning and operating, for the benefit of the railroad companies owning its stock, a union station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas. Such facilities were acquired and constructed and the Terminal Company has been for many years and is now operating them in interstate commerce and is a common carrier subject to the provisions of the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

(5) On June 12, 1909, a Stock Trust Agreement was entered into between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, as parties of the first part (hereinafter termed the Proprietary Companies), which companies at that time owned, in equal parts, all the capital stock of the Terminal Company; Pioneer Trust Company of Kansas City, Missouri, as Trustee, party of the second part, and the Terminal Company, as party of the third part. Under said agreement, each of the Proprietary Companies agreed to execute an agreement with respect to the use by it of the facilities of the Terminal Company

and payment by it of a share of the expenses of operating and maintaining such facilities, and as security for the performance by it of such obligations, agreed to transfer to the Trustee all but five shares of the capital stock of the [fol. 4] Terminal Company then owned by it. Such shares were to be voted by the Proprietary Companies owning them, if such Companies were not in default under the agreement covering the use of the Terminal Company's facilities, under proxies to be furnished by the Trustee, but if any Proprietary Company was excluded from the use of such facilities, then its stock was to be held by the Trustee for the benefit of the Proprietary Companies continuing to enjoy such use.

(6) On June 12, 1909, an Operating Agreement was entered into between the Terminal Company, as party of the first part, the Proprietary Companies, as parties of the second part, and Illinois Trust and Savings Bank, as Trustee, as party of the third part, in and by which agreement provision was made for the construction of a union passenger station at Kansas City, Missouri, and for the use of such station and the other terminal facilities of said Terminal Company by the said Proprietary Companies. Said agreement was the agreement referred to in the Stock Trust Agreement hereinbefore mentioned. On January 24, 1910, an agreement supplemental to the Operating Agreement of June 12, 1909, was entered into between the Terminal Company, as party of the first part, relators, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company, as parties of the second part, the Proprietary Companies, as parties of the third part, and Illinois Trust and Savings Bank, as Trustee, as party of the fourth part, in and by which said agreement of January 24, 1910, all the provisions of said Operating Agreement of June 12, 1909, were extended to and made effective as to said relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company. Under said agreement of January 24, 1910, relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company acquired a sufficient number of shares of the capital stock of the Terminal Company, so that each of them and each of the Proprietary Companies owned one-twelfth of such capital stock. Said capital stock so acquired by said relators was

then deposited with the Trustee under the Stock Trust Agreement of June 12, 1909, and said relators were put in the same relation to the Terminal Company as the Proprietary Companies. The Operating Agreement of June 12, [fol. 5] 1909, and the Supplemental Agreement of January 24, 1910, constitute one agreement in fact and effect and will be hereinafter collectively termed the Operating Agreement, copies thereof being attached hereto and made a part hereof, marked "Exhibit 1."

(7) Shortly after the making of the Operating Agreement of June 12, 1909, the Terminal Company made arrangements for and subsequently issued and sold $50,000,000 of 4% bonds, secured by mortgage on the properties of the Terminal Company. The Terminal Company also proceeded to construct the union station and certain other terminal facilities referred to in the Operating Agreement, and since the date hereof, the Proprietary Companies and their successors in interest, including relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, have used said station and other terminal facilities in accordance with the terms of said Operating Agreement.

(8) Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rents, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under said Operating Agreement. The foregoing payments were required to be made without respect to the amount of use made of the Terminal Company's facilities by the Proprietary Companies, including relators. Under other paragraphs of Article II of the Operating Agreement all other expenses of the Terminal Company, including all maintenance and operation expenses, were to be distributed

among the Proprietary Companies, including relators, on the basis of the percentage of use made by each of said companies of the facilities of the Terminal Company. Ever since the execution of the Operating Agreement, relators and the Proprietary Companies or their successors have [fol. 6] made payments under the Operating Agreement in accordance therewith. Each of the users of the Terminal Company's facilities makes such use thereof as is necessary to afford suitable service to the public, and the percentage of such use by each user is thus different. Four of such users have always made and now make a much larger use of such facilities than the other eight users, including relators, notwithstanding which all such users are required by the Operating Agreement to pay the same percentage of the interest and tax charges of the Terminal Company. As illustrating the gross discrimination resulting from the difference between the charges which the smaller users of the Terminal Company's facilities must pay and the charges which the larger users must pay, the largest user in 1932, whose use was 26.06% of all the use of said facilities, paid $195,303.56 (on a numerical basis) as its share of the interest and taxes paid by the Terminal Company; while the smallest user (one of relators), whose use was only 2.24% of all the use, paid $190,812.99. If said charges for interest and taxes had been paid by the using railroad companies on a user basis, said large user would have paid $599,655.32 instead of $195,303.56, and said small user would have paid $51,543.67, instead of $190,812.99. There is attached hereto and made a part hereof, marked "Exhibit 2," a statement showing the amount paid in 1932 by each user of the Terminal Company's facilities on account of the interest and tax charges of said Company, as compared with the amount which each such user would have paid had such charges been distributed among such users on a user basis. Said statement shows that in 1932, the four large users of said facilities, because of the distribution of charges required by the Operating Agreement, saved $811,986.08 in operating expenses resulting from their use of said facilities, which saving was exacted from the smaller users of said facilities, whose operating expenses were increased by the same amount.

(9) Sometime prior to March 10, 1924, Missouri-Kansas-Texas Railroad Company, the purchaser at judicial sale of all the railways and properties of Missouri, Kansas and

Texas Railway Company, one of the Proprietary Companies, in exercise of a right conferred upon it by decree entered in receivership proceedings involving Missouri, [fol. 7] Kansas and Texas Railway Company and its properties, elected not to assume the Operating Agreement theretofore entered into by said Missouri, Kansas and Texas Railway Company, and renounced and disaffirmed said agreement. Thereafter, on March 10, 1924, said Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order by said Commission, pursuant to the provisions of Paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company at Kansas City, Missouri-Kansas. In said petition it was alleged that the terms imposed upon said Missouri-Kansas-Texas Railroad Company by the Operating Agreement, for its use of said station and terminal facilities, were unjust, inequitable and burdensome, in that each of the parties thereto was required to pay one-twelfth of the interest on the bonded indebtedness of the Terminal Company and one-twelfth of the taxes, general and special, payable by it in each year, without regard to the measure of use of said terminal facilities made by each of the railroad companies, parties to said agreement. It was prayed in said petition that said Commission should prescribe, upon a user basis, the terms upon which said Missouri-Kansas-Texas Railroad Company should be permitted thereafter to use those portions of said terminal facilities which it desired to us. Said petition was received and filed by the Commission as its Docket Number 15682. Pending hearing upon said petition, the Commission entered its Service Order No. 40, permitting said Missouri-Kansas-Texas Railroad Company to use the terminal facilities of the Terminal Company under the terms and provisions of the Operating Agreement and for the compensation therein provided, subject to the final decision of the Commission in said cause; and in the event of the failure of the parties to agree upon proper compensation, upon such terms as the Commissioner might thereafter fix.

(10) Thereafter, and before any hearings were had by the Commission in its said Docket 15682, the relators herein filed with the Commission intervening petitions in

said cause, in which petitions it was generally alleged that said interveners were entitled to the same relief prayed by said Missouri-Kansas-Texas Railroad Company in the [fol. 8] petition theretofore filed by it; that the distribution of the taxes and interest charges of the Terminal Company among the proprietary lines thereof was inequitable, unjust, unreasonable, discriminatory, and unlawful; that the granting of the relief requested by said Missouri-Kansas-Texas Railroad Company would aggravate such injustice, inequity and discrimination; and that the Operating Agreement was unjust, inequitable and burdensome. It was then prayed that the Commission enter an order which would place the use of the terminal facilities of the Terminal Company and the compensation to be paid for such use by each of the railroad companies, parties to the Operating Agreement, upon a fair, just and equitable basis, in proportion to the use thereof made by the various parties. Copies of said intervening petitions are attached hereto, and made a part hereof, marked Exhibits 3 and 4. Petitions of intervention were also filed in said cause by the other railroad companies using the facilities of the Terminal Company, the petitions of the smaller users praying generally for the same relief requested by relators, and those of the larger users praying generally that the relief requested by Missouri-Kansas-Texas Railroad Company be denied. Upon the filing of said petitions of intervention, orders were entered by the Commission permitting said interventions, and, except as hereinafter stated, the parties filing said petitions were thereafter treated and considered as parties to said cause.

(11) Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5. In said report, the Commission disregarded the fact that the entire amount paid by each railroad company using the facilities of the Terminal Company constituted the

charge made by the Terminal Company against such using company for its use of such facilities; the fact that such charges were discriminatory in favor of the railroad com- [fol. 9] panies making the largest use of such facilities and against those making small use thereof; the fact that the payments made by the smaller users of the facilities of the Terminal Company constituted an undue burden upon and discrimination against the interstate commerce of each of them, and assumed that the Operating Agreement was an ordinary business contract entered into, in part, at least, for the profit to be derived therefrom, although there was no possibility of such profit. A majority of the Commission therefore held that since all payments to be made by railroad companies because of their use of the facilities of the Terminal Company were fixed by the Operating Agreement, it had no jurisdiction to enter an order prescribing any different basis for the making of such payments, and that the intervening petitions of the small users of such facilities, including relators, should be dismissed.

In stating the question passed upon by it, the Commission said at page 222 of its report:

"Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

Dealing with its powers under Paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said at page 223 of its report:

"The power and authority thus invoked are not conferred by the quoted paragraph."

In discussing its power under Section 15 (a) of the Act to Regulate Commerce, the Commission said at page 224 of its report:

"However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to

find the requisite power or authority in any other provision of the act."

[fol. 10] The distribution of charges under the Operating Agreement was so unjust that the Commission, while denying its jurisdiction to correct the situation, said at page 225 of its report:

"In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions.

(12) Pursuant to the conclusions thus expressed in its report, the Commission made an order in said Docket 15682, on November 10, 1925, dismissing the intervening petitions theretofore filed by The Chicago and Alton Railroad Company and the Receivers thereof, Chicago, Milwaukee and St. Paul Railway Company, The Wabash Railway Company, St. Louis-San Francisco Railway Company, and relators, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company. Since the entry of said order, relators have not been parties to said cause and have had no right to be heard therein, nor on review of any order made therein, although they have had at all times and now have a vital and direct interest in any disposition made thereof by the Commission.

(13) Subsequent to the report of the Commission in said Docket 15682, on November 10, 1925, the right of Missouri-Kansas-Texas Railroad Company to elect not to assume the Operating Agreement was upheld in the courts, and in March, 1931, said Railroad Company filed with the Commission its application for further hearings in said cause to determine the amount of compensation which should be paid by it for its use of the facilities of the Terminal Company, said application being the first action taken in said cause after the making of the order of November 10, 1925. In April and May, 1931, before any such further hearings were had, relators filed with the Commission petitions asking for a rehearing of the Commission's order of November

10, 1925, dismissing their intervening petitions in said cause. Said petitions for rehearing were denied by the [fol. 11] Commission by order entered on June 1, 1931. Since that date, the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company in said Docket 15682, have been the subject of numerous hearings by the Commission, said cause now being set for further hearing upon June 1, 1933. Relators have been and will be unable to take any part in said hearings in order to protect their interests, the Commission's order of November 10, 1925, having terminated and barred their right to be heard. During the pendency of said Docket 15682, said Missouri-Kansas-Texas Railroad Company has been and is now using the passenger station and other terminal facilities of the Terminal Company by virtue of various agreements between it and the Terminal Company and under orders of the Commission, and for its use of said terminal facilities is paying compensation upon the basis prescribed by the Operating Agreement, subject, however, to retroactive revision to the basis of compensation hereafter prescribed by the Commission in said Docket 15682. Since November 10, 1925, there has been no change in Docket 15682, nor in the conditions and circumstances which caused the filing by Missouri-Kansas-Texas Railroad Company of its petition therein. Said cause is still pending before the Commission and there has been no final order entered therein. The Union Station and other facilities of the Terminal Company are still being used by relators and the other Proprietary Companies, and/or their successors in interest, in the same way they were used prior and subsequent to November 10, 1925, by said Companies and/or their successors in interest. The payments now being made by said Companies and/or their successors in interest are made under the same conditions and circumstances as those which obtained on November 10, 1925 and prior thereto.

(14) Relators charge that it may be reasonably anticipated that the Commission, in fixing in said Docket 15682 the compensation to be paid by said Missouri-Kansas-Texas Railroad Company for its use of the terminal facilities of the Terminal Company, will permit that use of such facilities upon the payment of a lesser compensation than said Missouri-Kansas-Texas Railroad Company would be required to pay under the terms and provisions of the

Operating Agreement, and that in the event of such disposition of said Docket 15682, the amounts now payable by each [fol. 12] relator under the Operating Agreement for its use of the facilities of the Terminal Company will be increased by its proportion of the difference between the amounts Missouri-Kansas-Texas Railroad Company would have been required to pay under the Operating Agreement and the amounts it may be required to pay under the order of the Commission, because if the amount to be paid by said Missouri-Kansas-Texas Railroad Company under the order of the Commission is less than its present proportion of the operating expenses, taxes and interest of the Terminal Company, the amount of such reduction will be distributed in equal parts among the other users of such facilities, including relators, and thereby added to the charges which they are now paying; that such a decision in said Docket 15682 will aggravate and increase the present injustice and inequity of the Operating Agreement, the present discrimination against relators resulting from its enforcement, and the undue burden imposed by its operation upon the interstate commerce of each of the relators; that relators have a lawful right to be heard in said Docket 15682, on the issue of the compensation to be paid by them for their use of the facilities of the Terminal Company, and the issue of the compensatioin to be paid by said Missouri-Kansas-Texas Railroad Company for its use of said facilities, but have been deprived and are now deprived of said right under the order of the Commission entered in said cause on November 10, 1925.

(15) That there is no hope for any lightening of the burdens now resting upon the small users of the facilities of the Terminal Company is demonstrated by the fact that the properties of St. Louis-San Francisco Railway Company and The Wabash Railway Company, both small users of said facilities, are now being operated by receivers appointed by United States District Courts. The receivers of The Wabash Railway Company have already renounced the Operating Agreement and declined to be further bound by it, and are using said facilities under a Service Order issued by the Commission. The receivers of St. Louis-San Francisco Railway Company have a similar right to disaffirm and renounce the Operating Agreement. Also, The Alton Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which are small users

of said facilities and the respective purchasers at judicial [fol. 13] sale of the railways and property of The Chicago and Alton Railroad Company and Chicago, Milwaukee and St. Paul Railway Company, have the right, under decrees entered by United States District Courts, to disaffirm and renounce the Operating Agreement. If each of the aforesaid four users of said facilities should renounce the Operating Agreement and refuse to be further bound thereby, and be granted the right by the Commission to use said facilities for lesser amounts than they are now paying, the difference between said amounts and the amounts said users are now paying will have to be paid in equal shares, by the other users of said facilities, including relators, thus imposing upon relators an additional obligation so great as to constitute an excessive and undue burden upon the interstate commerce of each of them.

(16) Relators further charge that the action of the Commission in denying its jurisdiction and dismissing the intervening petitions of the so-called small users of the facilities of the Terminal Company, including relators, as was done in its order of November 10, 1925, was erroneous in law and constituted a denial by the Commission of a jurisdiction conferred upon it by the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

(17) Relator further charges that under the law, the Commission did have jurisdiction to consider, pass upon and decide the merits of the issues presented to it in the intervening petitions, including those of relators, which were dismissed by its order of November 10, 1925, entered in said Docket 15682, and that by failing and refusing to exercise its said jurisdiction, the Commission acted in an arbitrary manner and contrary to law and deprived relators of rights to which they were and are entitled under the law.

(18) Relators further charge that the Commission did not give consideration to the merits of the issues presented to it for determination in the intervening petitions which were dismissed by it in its said order of November 10, 1925, but reached a conclusion erroneously denying its jurisdiction to consider and decide such issues on their merits; that such denial of jurisdiction was contrary to law and constituted a denial of the lawful rights of rela-

tors; that except for such relief as should be granted by the Commission but which said Commission has refused to grant, relators have no adequate judicial remedy other [fol. 14] than by petition to this Court for the issuance of its writ of mandamus. This is the first application for a writ of mandamus in this cause.

Wherefore, relators respectfully pray to this Honorable Court:

(1) That a rule be laid requiring the respondent, Interstate Commerce Commission, to appear and answer this petition within such time as the Court may deem proper, and to show cause by a time limited in said rule why a writ of mandamus should not issue.

(2) That the Court grant an order for the issuance of a peremptory writ of mandamus commanding and directing the respondent, Interstate Commerce Commission, to set aside, vacate and annul its order of November 10, 1925, made in said Docket 15682, dismissing the intervening petitions of relators, and its order of June 1, 1931, denying their petitions for a rehearing in said cause, and commanding and directing said respondent to forthwith consider and pass upon the merits of the issues raised by said intervening petitions and decide the same upon the merits thereof; or if the Court be not minded to issue its peremptory writ, then that an alternative writ be issued commanding the respondent, Interstate Commerce Commission, to appear before the Court on a day to be named in said writ and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring said respondent to perform said acts, and for such other further order and relief as they may be entitled to in the premises.

And as in duty bound your relators will ever pray.

Chicago Great Western Railroad Company, The Kansas City Southern Railway Company, by P. H. Joyce.

[fol. 15] *Duly sworn to before P. H. Joyce. Jurat omitted in printing.*

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Attorneys for Relators. F. H. Towner, 38 So. Dearborn St., Chicago, Ill.; Union Trust Bldg., Washington, D. C., c/o Hamilton & Hamilton.

[fol. 16] EXHIBIT 1 TO PETITION

Operating Agreement Between Kansas City Terminal Railway Company and Ten Railway Companies, Dated June 12, 1909, and First Supplemental Agreement Between Kansas City Terminal Railway Company and Chicago Great Western Railroad Company, and The Kansas City Southern Railway Company, Dated January 24, 1910

[fol. 17] Agreement Between Kansas City Terminal Railway Company, of the First Part; The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacfic Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the Second Part, and Illinois Trust and Savings Bank, as Trustee, of the Third Part.

Relating to Union Passenger Station and Other Terminal Facilities at Kansas City

Dated June 12th, 1909.

[fol. 18] Indenture, made this 12th day of June, 1909, by and beween Kansas City Terminal Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri (hereinafter called the Terminal Company), party of the first part, The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas (hereinafter called the Atchison Company); Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin (hereinafter called the St. Paul Company); The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa (hereinafter called the Rock Island Company); St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation

of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska, and Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois, parties of the second part; and Illinois Trust and Savings Bank (hereinafter called the Trustee Company), a corporation of the State of Illinois, the corporate trustee under the First Mortgage, hereinafter mentioned, of the Terminal Company, party of the third part:

Whereas, the Terminal Company owns a line of railroad and other railroad facilities located in and about the city of Kansas City, Missouri, and the city of Kansas City, [fol. 19] Kansas, which by deeds of conveyance it has acquired from The Kansas City Belt Railway Company, and from the Union Depot Company, and, by other conveyances, has acquired, or is about to acquire, the necessary land therefor and to construct a Union Passenger Station and certain additional railroad facilities and appurtenances, all of which, both those now owned and those to be acquired or constructed, are shown in detail upon maps, schedules, plans and specifications on file among the records of the Terminal Company, which said maps, schedules, plans and specifications have been marked for identification by the Chief Engineer of each of the railway companies parties hereto and accepted and approved by an executive officer of each of at least seven of the railway companies parties hereto and which are hereinafter collectively referred to as the "Plans" and are made a part of this agreement as fully as if set forth at length herein or attached heerto; and,

Whereas, the Terminal Company is about to execute to said Trustee Company and to Samuel W. Moore, of Kansas City, Missouri, as trustees, a mortgage or deed of trust, dated Jan. 3d, 1910, to be known as its First Mortgage, covering all the property of the Terminal Company now owned and hereafter to be acquired by the use of the bonds secured thereby or their proceeds, including this agreement and the rentals to be paid heerunder, as herein provided, to secure an issue of bonds of the Terminal Company not to

exceed in the aggregate fifty million dollars at any one time outstanding; and

Whereas, each of the railway companies parties of the second part hereto (hereafter collectively referred to as the Railway Companies) desires, for purposes of greater economy and convenience, to avail itself of the services of [fol. 20] the Terminal Company and the use of said Union Passenger Station, line of railroad, tracks, and all other facilities of the Terminal Company; and the Terminal Company is willing to serve the Railway Companies and to grant to the Railway Companies the right to use all the facilities of the Terminal Company upon the terms and conditions hereinafter set forth:

Now, therefore, the parties hereto do mutually covenant and agree with each other as follows:

Article I

Terminal Company agrees.

The Terminal Company, in consideration of the sums to be paid by the Railway Companies respectively as hereinafter provided, hereby covenants and agrees with the Railway Companies and with each of them as follows:

To build station and other facilities.

Section 1. That it will proceed with all reasonable dispatch to acquire the necessary land and complete the construction of said Union Passenger Station and the facilities appurtenant thereto at the location thereof shown on said Plans, and to rearrange, reconstruct, add to and better the railroad and terminal facilities at present owned or controlled by it and make all necessary and desirable connections with the railroads of each of the Railway Companies, all in accordance with such Plans.

"Terminal facilities" defined.

The said Union Passenger Station and the said tracks and other facilities of the Terminal Company, and all additions, betterments, extensions and improvements thereto, and all the facilities appurtenant thereto that are now owned or may be hereafter acquired by the Terminal Company are hereinafter referred to as the "Terminal Facilities."

Grant of right to use same.

[fol. 21] Sec. 2. That it will, and it does hereby, subject to the terms and conditions in this agreement contained, give and grant to each of the Railway Companies for and during the term beginning at the date when the Terminal Facilities shall be ready for use as in Section 10 of Article

III hereof provided and continuing thereafter for and during the full term of two hundred years thence next ensuing, the right and privilege of running and operating its passenger trains, into said Union Passenger Station and of using and enjoying, for the purpose of its passenger, express and mail business, the said Union Passenger Station and its appurtenances so to be constructed by the Terminal Company hereunder, and all conditions, betterments, extensions and improvements thereto that hereafter during said term shall be acquired by the Terminal Company; and also the right of running and operating its passenger trains, for the purposes of the passenger traffic of such Railway Company over and upon the railroad and railroad tracks of the Terminal Company as in this contract provided, and of using and enjoying said railroad and tracks for the purposes of the passenger traffic of such Railway Company, and over all additions and betterments, extensions and improvements thereto that hereafter during said term shall be acquired by the Terminal Company, such use by each of the Railway Companies to be in common with all other Railway Companies to which similar rights are hereby or to which similar rights hereafter may be granted by the Terminal Company in pursuance of the terms, conditions and limitations in this agreement expressed. The rights and privileges by this Section 2 granted shall include the right to occupy sufficient space in the Union Passenger Station and its appurtenances for the sleeping car and express business of each of the Railway Companies, upon the payment therefor of such reasonable [fol. 22] compensation as may be fixed, from time to time, by the Terminal Company; but shall not include the right to make up or break any passenger train or to do any switching of passenger cars or trains upon said Terminal Facilities without written permission of the Terminal Company, and then only under such reasonable terms and regulations as the Terminal Company may from time to time prescribe.

For passenger traffic.

Certain rights excluded.

Sec. 3. That it will upon request furnish motive power, switch, move and handle the passenger cars of the Railway Companies, respectively, as herein provided, upon or over the Terminal Facilities, or any part thereof, without preference or discrimination, and that it will keep and

To furnish switching service for passenger traffic and

provide round house, etc.

To make light repairs, etc.

maintain a roundhouse, storage tracks, cleaning tracks and other similar facilities where it will care for and make light repairs on the passenger engines and passenger cars of the Railway Companies, for which services charges shall be made by the Terminal Company at such rates as may be established by it from time to time.

Grant of right to use for freight traffic.

Sec. 4. That it will give and grant, and it does hereby give and grant, to each of the Railway Companies, subject to such reasonable regulations as the Terminal Company may from time to time prescribe, and so far only as said right may be exercised without materially interfering with the passenger traffic in this contract provided for, the right and privilege, for said term of two hundred years, of running its freight trains, drawn by its own motive power and manned by its own crews, upon and over said Terminal Facilities, or any part thereof. The right and

Exceptions.

privilege by this Section 4 granted shall not include the right to make up or break any freight train or to do any switching of freight cars or trains upon said Terminal Facilities without written permission of the Terminal Company, and then only under such reasonable terms and [fol. 23] regulations as the Terminal Company may from time to time prescribe.

Switching service for freight traffic.

Sec. 5. That it will, for all internal movements thereof, furnish motive power, switch, move and handle the freight cars of the Railway Companies, respectively, as herein proided, upon or over the Terminal Facilities, or any part

Will maintain Terminal Facilities.

thereof, without preference or discrimination, for which service charges shall be made by the Terminal Company at such rates as may be established by it from time to time.

Sec. 6. That it will keep and maintain said Terminal Facilities at all times during said term, in good order, condition and repair and will protect the same by such insurance against loss or damage by fire as may in the judgment of the Terminal Company be adequate, the cost of such insurance being considered a part of the expense of

Will Maintain franchises and corporate existence.

maintaining and operating said Terminal Facilities as hereinafter provided.

Sec. 7. That it will not do or omit to do any act, the doing or omission of which will operate directly or indirectly to forfeit any of the rights, privileges and franchises acquired under its charter or howsoever acquired,

or which will, in any manner, impair the value of any of the privileges, rights or property, the right to use which is hereby granted to the Railway Companies, or to impair its power or ability to perform all its obligations in this contract provided for; and that it will, at the expiration of the present term of its corporate existence, cause the same to be renewed and extended in manner and form as may then be provided by law, and will cause similar renewals and extensions to be made from time to time as the same shall be necessary to maintain, during the full term of this agreement, the existence and power with which it is now vested.

[fol. 24] That it will at all times and from time to time during the said term, when requested by said Railway Companies, or any of them, put forth and exercise each and every corporate power and do each and every corporate act which said Terminal Company might now or may at any time hereafter lawfully put in force or exercise to enable the Railway Companies and each of them to enjoy and avail themselves of and exercise every right, franchise and privilege hereby granted in the proper management and operation of the Terminal Facilities according to the terms of this agreement.

Will exercise corporate powers.

Sec. 8. That it will repay to each of the Railway Companies all sums which shall be paid or advanced to the Terminal Company by such Company prior to the date when said Terminal Facilities shall be ready for use, as in Section 10 of Article III hereof provided; provided, however, that until said date, the Atchison Company, the St. Paul Company and the Rock Island Company, anything to the contrary herein contained notwithstanding, shall continue to make payments to The Kansas City Belt Railway Company, or its successors or assigns under the respective agreements in Article IV particularly referred to in respect of interest, taxes and maintenance upon such portions of the Terminal Facilities as they shall respectively continue to use under said agreements respectively; it being, however, expressly understood and agreed that during the period of rearrangement of the present facilities and construction of new facilities, as hereinbefore provided, the payments to be made by the Atchison Company, the St. Paul Company and the Rock Island Company, under said respective agreements, shall in no wise be increased by rea-

Will refund certain payments.

son of the rearrangement of facilities and the construction of new facilities, as hereinbefore provided.

[fol. 25] Article II

Railway companies to pay:

Section 1. Each of the Railway Companies hereby covenants and agrees with the Terminal Company, with the Trustee Company and with each of the other Railway Companies, to pay, from time to time as hereinafter provided, the following sums, viz:

Interest on mortgage.

(a) Ten days prior to each date when any interest shall be payable upon any bonds that shall have been issued and that shall be outstanding under said First Mortgage of the Terminal Company, a sum equal to one-tenth of the interest to become due and payable on such date on all bonds then outstanding under said First Mortgage.

Principal of mortgage.

(b) On the day when any of said First Mortgage Bonds of the Terminal Company shall become due and payable either by their terms, or by acceleration of payment as provided in the said bonds or in said mortgage, a sum equal to one-tenth of the principal of such First Mortgage Bonds payable on such date.

Taxes.

(c) Ten days prior to each date when any sum shall be payable by the Terminal Company for taxes, rates, benefits, assessments or other governmental charges of any kind, a sum equal to one-tenth of such sum to become payable on such date.

Interest on Belt Line mortgage.

(d) Ten days prior to each date when any interest shall be payable upon any bonds that shall have been issued and that shall be outstanding under the certain first mortgage, dated July 1, 1886, executed by The Kansas City Belt Railway Company to The New England Trust Company, as Trustee, a sum equal to one-tenth of the interest to become due and payable on such date on all bonds then outstanding under said last mentioned mortgage. On the day when any of said first mortgage bonds of The Kansas City Belt Railway Company shall become due and payable, a sum equal to one-tenth of the principal of such first mortgage bonds payable on such date, unless said bonds shall be retired with the First Mortgage Bonds or their proceeds, as provided in said First Mortgage.

Principal of Belt Line mortgage.

[fol. 26] (e) Ten days prior to each date when any interest shall be payable upon any other bonds or obligations that shall be issued as in Section 3 of this Article II provided, by the Terminal Company with the written consent of a majority of the Railway Companies then not in default in the payment of the several sums by them payable under this Article, a sum equal to one-tenth of the interest to become due and payable on such date on such other bonds or obligations. Interest on other bonds.

(f) In case any of the Railway Companies shall make default in the payment of any sum which under the provisions of this section shall be payable by such Railway Company, then the sum which such Railway Company in default failed to pay shall be apportioned equally among the other Railway Companies or the one of them not in default, and each of such other Railway Companies, or the one (as the case may be), shall pay a ratable (or the whole) share of such sum forthwith upon demand of the Terminal Company, or, if the Terminal Company be in default, as hereinafter specified, under its said First Mortgage, then upon demand of the Trustee Company. Default of any Ry. Co.

The obligation of each Railway Company to make the payments specified in this section is absolute and unconditional; provided, that if any other Railway Company or Companies shall be hereafter from time to time admitted to the use of the Union Passenger Station and Terminal Facilities under agreements to pay the principal and interest of the First Mortgage Bonds and taxes upon substantially the same terms assumed by the Railway Companies in this agreement, then the payments to be made by the Railway Companies respectively under this Section 1 shall be reduced or adjusted, from time to time, to such a basis in respect to payment of principal, interest and taxes as will require each Company to be directly responsible for such [fol. 27] a proportion of the interest, principal and taxes as it bears to the total number of Companies using said properties and assuming the payment of principal and interest. Such payments unconditional.

No termination or suspension of any rights of any Railway Company pursuant to any provision of this indenture, or otherwise, shall limit or affect the obligation of the Railway Company whose rights are terminated or suspended or the obligation of any other Railway Com-

pany to pay the said several sums during the full term beginning on the date hereof and continuing for two hundred years from and after the date when the Terminal Facilities shall be ready for use as in Section 10 of Article III hereof provided. Each of the Railway Companies agrees that it will make the several payments by it to be made as aforesaid absolutely and unconditionally, without deduction for any set-off or counterclaim or other excuse, during such full term.

To whom payments made.

Except as provided in Section 2 of this Article II the several sums payable by each of the Railway Companies under the foregoing provisions of this Section 1 shall be payable to the Terminal Company or pursuant to its written order, either at the office of the Terminal Company at Kansas City, Missouri, or at an agency or depository elsewhere to be designated by the Terminal Company by a written notice to each Railway Company, stating the sum to be paid by it and the date and place of payment, which notice shall be given by the Terminal Company to each Railway Company at least ten days prior to the date when such sum shall be payable. Each sum paid to the Terminal Company under any of the foregoing provisions of this section shall be set apart by it upon special trust, to apply the same to the payment of the interest, or principal [fol. 28] of bonds, or other obligations, or the taxes, rates, benefits, assessments or other governmental charges in respect of which such sum became payable hereunder, or to reimburse the Terminal Company to the extent it shall have paid any of said items out of its other funds.

How applied.

Receipts assigned to mortgage trustees.

Sec. 2. The sums payable by the Railway Companies under any paragraph of Section 1 of this Article, (except paragraph (e)) are hereby assigned to the Trustees under said First Mortgage of the Terminal Company, as additional security under said First Mortgage; provided, however, that if and so long as the Terminal Company shall not be in default in the payment of any interest or principal of any of said First Mortgage Bonds the several sums payable by the Railway Companies under Section 1 of this Article shall be payable to the Terminal Company and shall be received, collected and applied by it as provided in said Section 1 of this Article.

In case of default.

In case the Terminal Company shall be in default in the payment of any interest or principal of any of its

said First Mortgage Bonds, and the Trustee Company or its successor Trustee Company under said First Mortgage, shall have given notice of such default to the Railway Companies, the several sums payable by the Railway Companies under the foregoing provisions of this section during the continuance of such default shall be payable to the Trustee Company or its successor at its main office within ten days after written notice from such Trustee Company. Each sum paid to such Trustee Company or its successor as aforesaid shall be received by it upon special trust to apply the same to the payment of the interest, or principal of bonds, or other obligations, or the taxes, rates, benefits, assessments or other governmental charges in respect of which such sum became payable, until the same [fol. 29] shall be fully paid or discharged.

Payments made direct to mortgage trustee.

Sec. 3. Whenever the Railway Companies shall make any payments to the Terminal Company pursuant to paragraph (b) of Section 1 of this Article on account of the principal of said First Mortgage Bonds of the Terminal Company, then the Terminal Company shall issue and shall deliver to each of the Railway Companies making any such payment the mortgage bonds of the Terminal Company to an amount at par equal to such payment. Such bonds shall bear interest at such rate and be payable at such date and shall be of such form and tenor as shall have been approved in writing by a majority of the Railway Companies then not in default in the payment of any of the several sums payable by them under Section 1 of this Article; and upon the issue and delivery of any such bonds the Railway Companies shall be liable to contribute in respect to the interest on such bonds, as provided in paragraph (e) of said section. Provided, however, that if the Terminal Company shall then be in default under its said First Mortgage and if such payments by the Railway Companies shall be made to the Trustee Company under said First Mortgage, as provided in Section 2 of this Article, then the Railway Companies making such payments shall not be entitled to the receipt of new bonds, but the Railway Companies, subject to the prior payment in full of the principal and interest of all the remainder of the outstanding bonds of the Terminal Company under said First Mortgage, shall be subrogated to all rights, lien and security of the holders of the bonds

New bonds issued.

To Railway Co's paying old bonds.

Subrogation.

paid out of the moneys contributed by the Railway Companies and applied in payment of the principal of such bonds, as though such bonds had been assigned to the Railway Companies ratably in proportion to their respec- [fol. 30] tive payments; but subject, nevertheless, to the prior payment in full of the principal and interest of all such bonds that shall not have been paid by the Terminal Company or out of such moneys contributed by the Railway Companies respectively.

Notice not essential.

Sec. 4. No failure of the Terminal Company or of the Trustee Company or its successor to give any notice or to make a demand upon any Railway Company, as in this Article provided, shall affect the obligation of any of the other Railway Companies to make the payments specified in Section 1 of this Article; and in case of a failure to give to any Railway Company notice, as hereinbefore provided, to pay any sum, such notice may be given at any time thereafter, and thereupon such sum shall be payable on the tenth day after such notice shall have been given.

How notice to be given.

Any notice to or demand upon any Railway Company under this Article may be given by mailing the same addressed to such Railway Company at Kansas City, Missouri, unless such Railway Company shall have given previous notice in writing to the Terminal Company and to the Trustee Company designating some other address to which such notices and demands shall be mailed, in which case such notices and demands shall be mailed to the address so designated. Any notice or demand so mailed shall be deemed duly served upon the company to which the same was addressed five days after the date when the same was mailed, whether or not such notice was actually received, and no other notice shall be required.

Claims against defaulting Co.s.

Sec. 5. If any of the Railway Companies shall be required to make any payment under paragraph (f) of Section 1 of this Article on account of the default of any other Railway Company or Railway Companies, then the claim or claims of the Terminal Company against the Railway

enforced by Terminal Co.

[fol. 31] Company or Railway Companies in default shall be held and enforced by the Terminal Company, as Trustee for the Railway Companies that made such payment, and any sum or sums received or collected from such Railway Company or Railway Companies in default shall be applied ratably to reimburse, with interest at the rate of

seven per cent per annum, the Railway Companies which made such payment.

Ry. Co.s to pay

Sec. 6. Each of the parties of the first and second parts hereby covenants and agrees with each of the other parties hereto to pay into the Treasury of the Terminal Company, from time to time, the following sums, viz:

expenses of operation, maintenance, etc.

For each calendar month of said term, a share, to be fixed and determined as hereinafter provided, of all expenses incurred by the Terminal Company during such month in the operation, maintenance, renewal and repair of the Terminal Facilities (after applying to such renewal and repair any sums which may have been received on account of fire insurance), including all salaries, cost of labor, supplies, time tables, cost of fire, accident, fidelity and employers' liability insurance, insurance of employees engaged in the operation or maintenance of the Terminal Facilities; and including also all other expenses whatsoever during such month not otherwise herein expressly provided for.

Terminal Facilities divided into sections.

For the purpose of determining the share of all such expenses to be paid by each of the parties of the first and second parts under this Section 6, the Terminal Facilities shall be divided into sections, numbered consecutively from 1 upwards. The Terminal Company shall from time to time, upon the authorization of its Board of Directors, change the boundary and extent of said sections or any of them, as in its judgment may be deemed necessary or desirable.

Account of cars and mileage in each section.

[fol. 32] The Terminal Company shall keep an accurate separate account of all such expenses of each of said sections and of all cars and engines passing into and out of the Union Passenger Station section, and of the mileage within the other sections, and shall on or before the fifteenth day of each calendar month of said term, render to each of the parties of the first and second parts an accurate statement thereof for the preceding calendar month.

The Union Station section.

The share of all such expenses of the section embracing said Union Passenger Station and its appurtenances to be paid by each of such parties under this Section 6 for each calendar month of said term, shall be a sum bearing the same proportion to all such expenses for such month as the number of locomotives and cars operated by such party and arriving at or starting from the Union Passenger

Station, shall bear to the total number of locomotives and cars arriving at or starting from said Union Passenger Station during such month, it being understood and agreed that each locomotive shall be counted as two cars; that the locomotives and cars in through trains stopping at said Station in passage shall be counted on entering and again on leaving said Station; that the locomotives and cars arriving at said Station as a final destination shall be counted on entering said Station, and shall again be counted on starting from said Station on an out-bound trip; that locomotives and cars shall not be counted on leaving the Station for the purpose of going to yards, storage tracks, or engine houses, or on entering the Station from yards, storage tracks or engine houses for the purpose of starting from the Station on an out-bound trip; nor shall switch locomotives engaged in switching such cars be counted.

The other sections.

The share of all such expenses of each of said sections, other than the section embracing said Union Passenger [fol. 33] Station and its appurtenances, to be paid by each of such parties under this Section 6 for each calendar month of said term shall be a sum bearing the same proportion to all of such expenses for such month as the mileage of locomoties and cars operated by such party within such section shall bear to the total mileage of locomoties and cars so operated during such month (including cars and locomotives handled and operated by the Terminal Company), it being understood and agreed that each locomotive shall be counted as two cars.

The sums payable under this Section 6 shall be payable monthly within thirty days after bills have been rendered by the Terminal Company to the parties of the first and second parts, respectively, therefor.

Sums payable when.

The Terminal Company is authorized to make sight drafts against any of the Railway Companies for any sums remaining unpaid after the same become due and payable under this agreement.

Sight drafts.

Sec. 7. If the Terminal Company shall receive from any Railway Company or corporation or person any rental or other compensation for the use of the Terminal Facilities, or of any other property of the Terminal Company, or of any part thereof, including the gross revenue received by the Terminal Company on account of its switching operations, and excepting contributions or payments received from Railway Companies on account of the expense of op-

Disposition of revenue received by Terminal Company.

erating, maintaining, renewing and repairing the Terminal Facilities (which expenses are to be paid on car and mileage bases, as provided in Section 6 of Article II hereof), then the rental or other compensations, including the gross revenue from said switching operation, shall be disposed of and applied by the Terminal Company as follows:

(a) From the gross revenue derived from switching operations there shall be deducted the expense of con- [fol. 34] ducting and carrying on the switching operations from which said revenue is derived. The expense properly apportionable to said switching operations shall be determined by the Auditor, under the supervision of the Board of Directors, from time to time, but shall not include any proportion of interest, taxes or other fixed charges.

Expense of switching operations.

(b) From the revenue received by the Terminal Company from the rental of space or from concessions or privileges in respect to the Union Passenger Station building and appurtenances directly and immediately connected therewith, there shall be deducted a fair and equitable proportion of expense incidental thereto, such as insurance, light, heat, janitor service, superintendence, etc. Such apportionment shall be made by the Auditor, under the supervision of the Board of Directors, from time to time, but shall not include any proportion of interest, taxes or other fixed charges.

Expense incident to rental of space, concessions, etc.

(c) The monthly share of the expense of operating, maintaining, renewing and repairing the Terminal Facilities payable by the Terminal Company, in accordance with the provisions of Section 6 of Article II hereof, shall next be paid.

Terminal Company's share of operating expenses.

(d) The remainder of the revenues received by the Terminal Company, as provided in this section, after setting aside such sum as a working capital as the Board of Directors may from time to time determine, shall be credited monthly to such of the Railway Companies, parties hereto, as may be at the time contributing to the payment of the interest charge and taxes upon the Terminal Facilities, in accordance with Section 1 of Article II hereof, in the same proportion in which said contributions are then being made; and the amount so credited to each of said Railway Companies shall be deemed and taken to be an advance payment by it, pro tanto, of any sum payable by it under the [fol. 35] provisions of Section 1 of Article II hereof.

Remainder of revenue to be credited to Railway Companies.

Errors in accounts.

Sec. 8. The accounts for each fiscal year of the Terminal Company shall be revised and any errors or omissions found therein shall be corrected and supplied and all necessary readjustments made within ninety days after the close of such fiscal year, but any error, mistaken estimate or omission in any bill against any of the Railway Companies shall be adjusted by suitable charges or credits in the first subsequent bill after discovery of such error, mistaken estimate or omission and in any event within ninety days after the close of such fiscal year. If the amount of any charge to be made against any party hereto cannot be definitely ascertained and fixed, then the Board of Directors of the Terminal Company shall estimate the same as nearly as may be and each of the parties of the first and second parts agrees to be bound by such estimate and payment shall be made accordingly.

Payments and interest on default.

Sec. 9. All sums payable by any Railway Company under Section 1 of Article II hereof shall be payable in gold coin of the United States of America of the present standard of weight and fineness or its equivalent. All other sums payable hereunder by any party to any other party hereto shall be payable in lawful money of the United States of America.

Any Railway Company in default in the payment of any sum payable by it hereunder shall pay interest at the rate of seven per cent per annum upon the amount so in default.

Inspection of books and accounts.

Sec. 10. The books and accounts of the Terminal Company shall be open for inspection at all reasonable times by the President of each of the Railway Companies, or by such officer or agent as any of them may appoint to inspect the same. The Auditor of the Terminal Company [fol. 36] shall render to the Auditor of each of the Railway Companies monthly statements showing all business done by the terminal Company and all business done on the Terminal Facilities or any part thereof, during the previous month, and upon demand of any of the Railway Companies, shall furnish to its Auditor promptly such information as such Auditor may require respecting the business and operations of the Terminal Company.

Auditing Committee.

Sec. 11. At the beginning of each fiscal year the Board of Directors shall select an Auditing Committee of three members, to be composed of the chief accounting officers

of three of the Railway Companies, to serve for the fiscal year in which they shall be appointed. It shall be the duty of the Auditing Committee to recommend to the Board of Directors from time to time such changes in the form of accounts of the Terminal Company as they may deem necessary or proper. The Auditing Committee shall from time to time audit and check the accounts of the Terminal Company and report to the Board of Directors.

Article III

The parties hereto severally covenant and agree with each other as follows:

Exclusive management by Terminal Co.

Section 1. The Terminal Company shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal Facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities and the use and enjoyment thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply equally and without discrimination to all the Railway Companies using the Terminal Facilities. The Railway [fol. 37] Companies agree to comply, and cause their employes to comply, with such rules and regulations.

Employes may be removed.

Sec. 2. If any employe of the Terminal Company (not including a President or other general or executive officer) shall be deemed by any of the Railway Companies to be incompetent, negligent or guilty of unfairness or discrimination, or otherwise unfit for the performance of his duties, such Railway Company or Companies shall deliver to the Terminal Company a written demand for the removal of such employe, specifying the reason for such removal, and thereupon the Terminal Company shall dismiss such employe forthwith.

Plan, etc., of terminal facilities.

Sec. 3. The plan, character and cost of the Terminal Facilities to be erected and provided hereunder shall, subject to the provisions of Section 1 of Article I hereof, be determined by the Board of Directors of the Terminal Company.

Exclusive facilities to be furnished

Sec. 4. In case any one or more (less than all) of the Railway Companies, parties hereto, or any other railway

company, shall desire any addition to be made to the Terminal Facilities of which addition it or they shall have the exclusive use, the Terminal Company may make such addition and grant the right to such exclusive use upon the following conditions in this Section 4 expressed, but not otherwise, viz.:

upon certain conditions.

(a) That the Company or Companies to which such right of exclusive use of part of the Terminal Facilities shall be granted shall enter into an agreement with the Terminal Company and thereby obligate itself or themselves to pay, during the term of such grant, for the right so granted (1) sums equal to interest on the fair value to be fixed in such agreement of the portion of the Terminal Facilities so to be used exclusively, including all improvements thereon; (2) sums equal to all taxes, rates, levies, benefits, assess-
[fol. 38] ments and other governmental charges upon the property so to be used exclusively; and (3) all expenses incurred by the Terminal Company in the operation, maintenance, renewal or repair of the property so to be used exclusively; and

(b) That each of the Railway Companies not then in default shall have consented in writing to the grant by the Terminal Company of such right of exclusive use and to the period for which the same shall be granted and to the other terms and provisions of such agreement.

Use by other R. R. Co's.

Sec. 5. Except when and to the extent required by law, the Terminal Company shall not grant to any other railway company the right to use the said Terminal Facilities unless not less than two-thirds of the Railway Companies parties hereto not then in default shall consent thereto in writing.

What payments are to cover.

Sec. 6. It is understood and agreed that the payments to be made by the Railway Companies under Section 6 of Article II hereof shall cover only the use and enjoyment of the Terminal Facilities and such services as are for the common benefit of the Railway Companies using the Terminal Facilities—such as the care of passengers in and about the train sheds and waiting rooms of said Union Passenger Station; the sale of tickets and the handling of baggage and mail thereat; the heating and lighting thereof; the maintenance and operation of tracks, switches, gates, towers, interlocking plants, etc., and generally the

management, supervision, maintenance and care of all the Terminal Facilities; but that all supplies which may be furnished by the Terminal Company to any of the parties hereto for their cars—such as water, ice, oil, gas, fuel, or supplies of any other nature—and all labor and material for repairing or for cleaning of cars; fuel, water and supplies for engines; care and attention of engines in [fol. 39] roundhouse; labor and material for cleaning and repair of cars; repairing engines and any and all such services, supplies or material shall be furnished in each instance at the sole cost, charge and expense of the particular Railway Company for which the same shall be furnished, and each of the Railway Companies agrees to pay to the Terminal Company, promptly upon statements being rendered to it therefor, the actual cost of all such supplies, materials, labor and services furnished or rendered to it, and any errors or omissions in any such statement may be corrected in subsequent statements.

None of the Railway Companies shall in any way obstruct or interfere with the access to and use of said Terminal Facilities by the parties hereto or by other railway companies having the right to use the same, or in any way obstruct or interfere with the execution or enforcement of all reasonable rules and regulations that may be established by the Terminal Company governing the use and enjoyment of the Terminal Facilities.

Ry. Co's not to obstruct use of facilities.

Sec. 7. The Terminal Company shall pay, satisfy and discharge all losses, damages, charges, costs, expenses and liabilities (including liabilities for loss or damage to property and injury or death to persons and including loss by embezzlement or other dishonesty of employes), which shall be suffered or incurred by the parties hereto, or by any other corporation or person, through or by reason of any negligence, carelessness, misconduct or other fault of the Terminal Company, or of any of its officers, agents, employes or servants in the management, operation, maintenance, repair, betterment, extension and renewal of the Terminal Facilities; and all sums paid by the Terminal Company under this clause shall be included as part of [fol. 40] the maintenance and operating expenses as provided for in Section 6 of Article II, and shall be paid accordingly.

Loss and damage caused by Terminal Co.

Compromise of claims.

Any claim against the Terminal Company based upon alleged liability which would be chargeable to the maintenance and operating expenses hereunder may be settled, compromised or satisfied by the Terminal Company on such terms as it may deem expedient, either before or after legal proceedings shall have been instituted in respect to such claim, and any sums paid in settlement, compromise or satisfaction of such claim shall be included as a part of said maintenance and operating expenses.

Loss and damage caused by Ry. Co's.

Sec. 8. Each of the Railway Companies shall pay, satisfy and discharge all claims and liabilities for losses, damages, charges, costs and expenses (including liabilities for loss or damage to property and injury or death of persons) suffered or incurred by the Terminal Company or by any party hereto or by any other railway company using the Terminal Facilities, or by any other corporation or person, through or by reason of any negligence, carelessness, omission or wrongful act of such Railway Company or of any of its officers, agents, employes or servants.

Destruction of Union Station.

Sec. 9. In case said Union Passenger Station shall be injured or destroyed by fire or other cause the Terminal Company shall and will repair and restore or rebuild the same upon substantially the same site and in accordance with plans which shall first have been approved by the President or some other executive officer of each of not less than two-thirds of the Railway Companies not then in default. Such work of repairing and restoring or rebuilding shall be begun as soon as it reasonably may be after such injury or destruction and shall be prosecuted continuously until completion. Pending such restoration or rebuilding such temporary arrangements as may be practicable shall be [fol. 41] made by the Terminal Company for the accommodation of the Railway Companies and there shall be no deductions in any of the payments to be made hereunder by the Railway Companies, by reason of such injury or destruction of said Union Passenger Station.

When facilities ready for use.

Sec. 10. The Terminal Company shall give to each of the Railway Companies thirty days' notice in writing of the date upon which the Terminal Facilities will be completed and ready for use hereunder, and each of the Railway Companies agrees that it will, on the terms of this agreement and during the term thereof, run into said Union Passenger

Station all its passenger, mail and express trains destined to or departing from said City of Kansas City, except suburban passenger trains originating at or destined to points within a radius of fifty miles from the Union Passenger Station; provided, however, and it is expressly understood and agreed by and between the parties hereto that the passenger station facilities to be furnished hereunder by the Terminal Company shall at all times be adequate for the accommodation of the passenger, mail and express business of each of the Railway Companies, except the suburban trains aforesaid.

Leased and owned companies included.

The rights herein granted by the Terminal Company are for the trains of the Railway Companies parties hereto, and for the trains of any Railway Company, whose railway shall be, at the time, leased to and operated by any of the Railway Companies parties hereto, its or their successors or assigns, and for the trains of any Railway Company, a majority of whose capital stock shall be at the time owned by any of the Railway Companies parties hereto, its or their successors or assigns, but do not include the right to use such Terminal Facilities by or for the trains [fol. 42] of any other railway companies. All trains, engines and cars operated as aforesaid by any of the Railway Companies and run by it into or upon said Terminal Facilities shall, for the purposes of this agreement, be deemed the trains, engines and cars of such Railway Company operating the same.

Covenants hereunder several and not joint.

Sec. 11. It is expressly understood and agreed that all of the covenants and agreements to be performed by the said Railway Companies under this agreement are several and not joint, and in no event shall either of said Railway Companies be liable for any default of any of the others, except as herein expressly provided.

Amendments.

It is further expressly understood and agreed that this agreement shall not be altered or in any wise modified or amended, without the consent in writing of each of the parties of the first and second parts hereto; provided, however, that the consent in writing of the Trustee Company, shall be also required before any modification shall be made or any provision hereof relating to the payments to be made under Section 1 of Article II hereof.

Assignment.

Sec. 12. The several covenants, conditions and stipulations of this agreement shall be binding upon and inure

to the benefit of the respective parties hereto, their successors, lessees and assigns. No assignment by any of the Railway Companies of any interest or right under this agreement, whether in connection with the sale of the assigning Railway Company's railway and other property or otherwise, shall release such assigning Railway Company from any of its obligations under this agreement. If any of the Railway Companies should be consolidated, the consolidated company shall be liable to make all payments [fol. 43] and to perform all obligations hereunder which would be obligatory upon each of the constituent companies if such consolidation had not been made.

Consolidation.

Default by Ry. Co.

Sec. 13. If any of the Railway Companies shall fail to pay any sum payable by it hereunder on or before the date when the same shall become due, or shall fail to perform or to comply with any other covenant or condition by it to be performed or complied with under this agreement, and such default shall continue for a period of thirty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Terminal Company, then and in any such case the Terminal Company shall have, and hereby is given, the right at its election to exclude such Railway Company from the use of the Terminal Facilities, and upon giving notice in writing of such election to such Railway Company, all rights of such Railway Company to use the Terminal Facilities shall then and there, by such notice, be terminated and the Terminal Company may exclude such Railway Company wholly from the Terminal Facilities; but such termination shall not relieve any party hereto from any liability that may have accrued prior to the date of such termination or deprive any party of the right to enforce any such liability, and such termination of the rights of one or more of the Railway Companies shall not affect the rights or obligations of any of the other Railway Companies whose rights have not been so terminated. Nevertheless, if the Railway Company in default, within thirty days after receipt of any statement rendered to it hereunder by the Terminal Company, shall give notice in writing to the Terminal Company that it contests the correctness of any specified item or items in such statement and shall pay [fol. 44] to the Terminal Company all sums other than the item or items so specified, and also, if demanded by the Terminal Company, shall furnish adequate security for

Exclusion of defaulting Co.

the contested item or items, then so long as such Railway Company in good faith shall contest the correctness of the item or items specified in such notice, the right of the Railway Company to use the Terminal Facilities shall not be terminated under this section by reason of the failure of such Railway Company to pay in full such item or items so contested. But no such notice, exclusion or termination shall relieve such Railway Company from the payments, to be made by it as in Section 1, Article II hereof provided; it being agreed and understood as a part of the consideration for this agreement that each of the Railway Companies parties hereto binds itself to make such payments absolutely and at all events.

In case such default of any Railway Company shall be in respect of payments to be made under Section 1, Article II, and shall continue for a period of thirty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Terminal Company, then and in any such case the Terminal Company shall, anything herein contained to the contrary notwithstanding, upon request in writing of any other one or more of the Railway Companies not in default, exercise the right hereinbefore in this Section 13 given, and wholly exclude such Railway Company so in default from the use of the Terminal Facilities.

Reinstatement of defaulting Co.

In case any of the Railway Companies shall be excluded from the use of the Terminal Facilities under this Section 13, such Railway Company shall be entitled, at any time within a period of one year after such exclusion, but no longer, to be reinstated to the use and enjoyment of all the [fol. 45] rights and privileges granted to it hereunder upon payment within such year to the Terminal Company of all sums for which it is in arrears, with interest thereon from the date such sums became due respectively at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, together with interest at the rate of seven per cent. per annum on the overdue installments of interest and upon compliance with such other conditions and considerations as the Directors of the Terminal Company may impose.

Schedules, time tables, etc.

Sec. 14. It is mutually understood and agreed that while each of the Railway Companies shall have the right to arrange its own schedules and time tables, this right shall be judiciously, fairly and equitably exercised by each so as

not to produce unnecessary inconvenience to any other of the Railway Companies. Should a dispute arise between the Railway Companies or any of them as to the arrangement of trains, the use of the Terminal Facilities or the time table or train schedule of the Railway Companies, the Terminal Company expressly reserves the power to determine and enforce the proper arrangement and order of trains, the proper use of the Terminal Facilities, and the proper arrangement of such time tables or train schedules, and to direct the adoption thereof and, if in its judgment it shall be necessary for the safe and proper conduct of the traffic over and upon the Terminal Facilities, the Terminal Company shall have the right of regulating or prescribing the rate of speed or movement of trains therein and thereon.

Article IV

Certain prior contracts.

Whereas, The Kansas City Belt Railway Company has heretofore made and entered into certain agreements which are here referred to and made a part hereof, as follows:

With St. Paul Co.

[fol. 46] (1) An agreement dated the thirty-first day of May, 1887, between The Kansas City Belt Railway Company and the Chicago, Wilwaukee and St. Paul Railway Company, which is now in full force and effect and all the rights under which are held, possessed and enjoyed by the St. Paul Company;

With Atchison Co.

(2) An agreement dated the thirty-first day of May, 1888, between The Kansas City Belt Railway Company, Chicago, Santa Fe and California Railway Company, and Atchison, Topeka and Santa Fe Railroad Company, which is now in full force and effect and all the rights under which have been acquired and are now held, possessed and enjoyed by the Atchison Company;

With Atchison Co.

(3) An agreement dated the first day of April, 1889, between The Kansas City Belt Railway Company, Chicago, Santa Fe and California Railway Company, and Atchison, Topeka and Santa Fe Railroad Company, which is now in full force and effect and all the rights under which have been acquired and are now hold, possessed and enjoyed by the Atchison Company;

With Rock Island Co.

(4) An agreement dated the first day of April, 1904, between The Kansas City Belt Railway Company and the

Rock Island Company, which is now in full force and effect; and

Whereas, by each of said agreements except the agreement with the Rock Island Company it is provided that the term thereof shall continue for a period of ninety-nine years after its date, and in and by said agreement with the Rock Island Company it is provided that the term thereof may be discontinued by six months' notice in writing; and

Whereas, the Terminal Company is the owner of the entire outstanding capital stock of The Kansas City Belt Railway Company, except Seven shares held by directors thereof and has acquired title to all the property of The [fol. 47] Kansas City Belt Railway Company, including said four agreements and has assumed and agreed to perform and carry out all the duties and obligations of The Kansas City Belt Railway Company, under said four agreements and each of them:

Now, therefore, in consideration of the execution of this present agreement by the Atchison Company, the St. Paul Company and the Rock Island Company, and of the payments to be made by said companies respectively hereunder, the Terminal Company covenants and agrees to and with each of said three last mentioned railway companies as follows:

Terms of old agreements extended.

Section 1. That the term of each of said four agreements shall be and the same hereby extended for two hundred and fifty years from and after the date when the Terminal Facilities shall be ready for use, as in Section 10 of Article III hereof provided.

Sec. 2. That, so long as this agreement continues in force and effect, the St. Paul Company, the Atchison Company and the Rock Island Company shall be and hereby are and each of them is released from all obligations to make any payment of rental or other payment whatsoever under said agreements or any of them, except as expressly provided in Section 8 of Article I hereof.

Equivalent facilities, etc., to be furnished

Sec. 3. That so long as this agreement continues in force and effect the Terminal Company shall, and hereby covenants and agrees that it will, anything in Section 4 of Article I hereof or elsewhere herein contained to the contrary notwithstanding, furnish the St. Paul Company, the

Atchison Company and the Rock Island Company, and each of them, the same or equivalent trackage facilities for the transaction of the freight business of each to and from its present freight terminals in Kansas City and [fol. 48] through Kansas City as each is entitled to under said four agreements, or any of them, and in case of the failure of the Terminal Company to furnish such trackage facilities over other tracks than those acquired from The Kansas City Belt Railway Company, then the St. Paul Company, the Atchison Company and the Rock Island Company each shall have and is hereby granted the right, at its option, to run and operate its freight cars and trains over the tracks acquired from The Kansas City Belt Railway Company, or tracks located substantially as such tracks are now located, for the transaction of such freight business of each.

Waiver of rights under old agreements, while this agreement in effect.

Sec. 4. It is hereby expressly understood and agreed by and between the parties hereto that so long as this agreement continues in force and effect as to all or any of the parties hereto, the said Atchison Company, the St. Paul Company and the Rock Island Company shall not claim, or be entitled to, any rights or privileges under said four agreements, but all rights and privileges in connection with the use of any property now owned or hereafter acquired by the Terminal Company and all rights to any service, privilege or advantage of any kind in connection with said property, shall so long as this agreement continues in force and effect be held and asserted only by said St. Paul Company, said Atchison Company and said Rock Island Company under this agreement; and in consideration of the extension of the time of said four written agreements and the execution of this agreement by the other companies, said Atchison Company, said St. Paul Company and said Rock Island Company hereby expressly waive any rights, privileges or advantages in connection with any of said property of said Terminal Company, or any service connected therewith during the time this agreement continues in force and [fol. 49] effect which are not enjoyed in common by all the other Railway Companies, parties hereto, except as hereinbefore in this Article IV provided. It being distinctly understood and agreed that, except as hereinbefore in this Article IV provided, all the Railway Companies shall so long as this agreement continues in force and effect, and

no longer, enjoy equal privileges and facilities, and that none of the Railway Companies shall have or possess any rights, privileges or advantages other or different from those enjoyed by all the other Railway Companies, and that none of the Railway Companies shall be subject to any charge or burden other than or different from that to which all the other Railway Companies are subject.

Sec. 5. It is further expressly understood and agreed that during the period of construction of said Union Passenger Station and of any re-arrangement of the Terminal Facilities or the construction of additions, extensions or improvements thereto, such rearrangement or construction shall be so carried on as not to seriously interrupt or interfere with the use of the Terminal Facilities by the St. Paul, the Atchison and the Rock Island Companies, respectively, under said four agreements.

Article V

Agreement assigned to mortgage trustees.

This agreement is hereby transferred and assigned to the Trustees under said First Mortgage of the Terminal Company by way of further security for the bonds issued under and secured by said mortgage and such other bonds as may be issued in accordance with the terms thereof, and it is hereby covenanted and agreed by and between the parties hereto that this agreement is subject to the lien of said First Mortgage, and that said Trustee Company shall have the right and power in its own discretion to enforce and require the enforcement of any and every covenant herein contained, the breach of which may in its judgment affect or impair the rights or security of said Trustees or [fol. 50] the bondholders represented by them; and the Terminal Company hereby expressly agrees to protect and hold said Trustees harmless from every expense, liability, claim, charge, action or demand which might impair the validity of this agreement, the right or security of said Trustees or the bondholders represented by them or which may be incurred by said Trustees in protecting their rights and security and those of the bondholders represented by them; and it is expressly understood and agreed that said Trustees, respectively, in exercising the powers conferred by this Article V, shall not in any manner be responsible or liable for any act, default or misconduct of any officer, agent or other person employed by the Trustees, except for willful default or misconduct.

"Trustee Company" defined.

Except when otherwise indicated, the words "Trustee Company," or any other equivalent term, as used in this Indenture are intended and shall be held to designate the Trustee Company under the said First Mortgage of the Kansas City Terminal Railway Company, and any successor trustee company under said First Mortgage and such successor trustee company shall have and is hereby granted the respective rights hereunder of the Trustee Company named in said First Mortgage.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents thereunto duly authorized and their respective corporate seals to be hereto affixed and attested by their respective Secretaries the day and year first above written.

[fol. 51] Kansas City Terminal Railway Company, (Signed) by Horatio L. Harmon, Its President. (Seal.)

Attest: (Signed) C. C. Ripley, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, (Signed) by E. P. Ripley, Its President. (Seal.)

Attest: (Signed) Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, (Signed) by A. J. Earling, Its President. (Seal.)

Attest: (Signed) T. C. Sherman, Assistant Secretary.

The Chicago, Rock Island and Pacific Railway Company, (Signed) by B. L. Winchell, Is President. (Seal.)

Attest: (Signed) Geo. H. Crosby, Secretary.

[fol. 52] St. Louis and San Francisco Railroad Company, (Signed) by A. J. Davidson, Its President. (Seal.)

Attest: (Signed) F. W. Young, Assistant Secretary.

Union Pacific Railroad Company, (Signed) by R. S. Lovett, Its Vice-President. (Seal.)

Attest: (Signed) Jos. Hellen, Assistant Secretary.

The Chicago and Alton Railroad Company, (Signed) by Geo. H. Ross, Its Vice-President. (Seal.)

Attest: (Signed) J. Steuart Mackie, Secretary.

The Wabash Railroad Company, (Signed) by F. A. Delano, Its President. (Seal.)

Attest: (Signed) E. B. Pryor, Assistant Secretary.

[fol. 53] Missouri, Kansas and Texas Railway Company, (Signed) by A. A. Allen, Vice-President and General Manager. (Seal.)

Attest: (Signed) C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, (Signed) by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

Chicago, Burlington and Quincy Railroad Company, (Signed) by Geo. B. Harris, Its President. (Seal.)

Attest: (Signed) H. W. Weiss, Assistant Secretary.

Illinois Trust and Savings Bank, as Trustee, (Signed) by Chauncey Keep, Its Vice-President. (Seal.)

Attest: (Signed) William H. Henkle, Secretary.

[fol. 54] State of Missouri,
County of Jackson, ss:

On this 12th day of June, in the year 1909, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order

of its board of directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of July, in the year 1909, before me personally came E. P. Ripley, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that [fol. 55] he is the president of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said E. P. Ripley acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 8th day of July, in the year 1909, before me personally came A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was

signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged [fol. 56] said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 25th day of June, in the year 1909, before me personally came B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) C. Nyquest, Notary Public, Cook County, Illinois. My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 57] STATE OF MISSOURI,
City of St. Louis, ss:

On this 21st day of August, in the year 1909, before me personally came A. J. Davidson, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the president of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said

instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. J. Davidson acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Arthur E. Haid, Notary Public, City of St. Louis, Missouri. My commission expires on the 10th day of April, 1912. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of August, in the year 1909, before me personally came R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is the vice-president of Union Pacific Railroad Company, one of the corporations described in and [fol. 58] which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

(Signed) L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1910. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 15th day of July, in the year 1909, before me personally came George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is vice-president of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument

is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation. [fol. 59] In Witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Harry K. McEvoy, Notary Public, Cook County, Illinois. My commission expires on the 21st day of March, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 25th day of June, in the year 1909, before me personally came F. A. Delano, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Vallie H. Rued, Notary Public, Cook County, Illinois. My commission expires on the 26th day of January, 1913. (Seal.)

[fol. 60] STATE OF MISSOURI,
County of St. Louis, ss:

On this 18th day of September, in the year 1909, before me personally came A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Dallas, in the State of Texas; that he is the vice-president of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instru-

ment is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Lee W. Hagerman, Notary Public, City of St. Louis, Mo. My commission expires on the 15th day of March, 1912. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

On this 21st day of September, in the year 1909, before me personally came C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the vice-president of The Missouri Pacific Rail-[fol. 61] way Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Margaret Lally, Notary Public, City of St. Louis, Missouri. My commission expires on the 11th day of January, 1913. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 22nd day of July, in the year 1909, before me personally came George B. Harris, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in

and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George B. [fol. 62] Harris acknowledged said instrument to be the free act and deed of said corporation.

In Witness whereof, I have hereunto set my hand and affixed my official seal of the day and year aforesaid.

(Signed) J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the 12th day of March, 1910. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this fourth day of March, in the year 1910, before me personally came Chauncey Keep, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the vice-president of Illinois Trust and Savings Bank, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said Chauncey Keep acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Morris Berger, Notary Public, Cook County, Illinois. My commission expires on the 26th day of May, 1912. (Seal.)

[fol. 63] First Supplemental Operating Agreement between Kansas City Terminal Railway Company, of the first part, and The Kansas City Southern Railway Company, and Chicago Great Western Railroad Company, of the second part, and The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul

Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the third part, and Illinois Trust and Savings Bank, as Trustee, of the fourth part.

Relating to Union Passenger Station and Other Terminal Facilities at Kansas City

Dated January 24th, 1910.

[fol. 64] Indenture, made this twenty-fourth day of January, 1910, by and between Kansas City Terminal Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri (hereinafter called the Terminal Company), party of the first part; The Kansas City Southern Railway Company, a corporation of the State of Missouri, and Chicago Great Western Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the New Companies), parties of the second part; The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska, and Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the Old Companies, parties of the third part, and Illinois Trust and Savings Bank, a corporation of the

State of Illinois (hereinafter called the Trustee Company), party of the fourth part:

Whereas, the parties of the first, third and fourth parts have heretofore on the 12th day of June, 1909, entered [fol. 65] into a certain agreement, relating to a Union Passenger Station, and other Terminal Facilities at Kansas City (to which this contract is supplemental), which agreement is hereinafter referred to as the "Operating Agreement;" and

Whereas, the New Companies severally desire to be admitted to the joint use of the Union Passenger Station and all the Terminal Facilities referred to in the Operating Agreement upon the terms and conditions named therein, and all of the other parties hereto are willing that they shall be so admitted to the same extent and with like effect as though they had been parties to the Operating Agreement originally;

Now, Therefore, the parties hereto do mutually covenant and agree with each other as follows:

First: The Terminal Company will and does hereby give and grant to each of the New Companies the right to the joint use of the Union Passenger Station and all the Terminal Facilities named and provided for in the Operating Agreement in common with the other Railway Companies now or hereafter entitled to use the same, for the full period of time named therein, and upon the terms and conditions thereof, to the same extent and with like effect as though the New Companies, and each of them, had been parties to the Operating Agreement originally, except that the obligation of the New Companies, and each of them, to make the payments required to be made under Section 1 of Article II of the Operating Agreement shall be one-twelfth of the whole instead of one-tenth thereof:

Second: The payments required to be made by each of the Old Companies, parties of the third part, under the provisions of Section 1 of Article II of the Operating Agreement shall be reduced as contemplated therein, so that each of the Old Companies, originally parties to the [fol. 66] Operating Agreement, shall pay from time to time a sum equal to one-twelfth of the whole payments re-

quired to be made in said Section 1 of Article II instead of one-tenth of such payments, as therein provided.

Third: It is the intention of the parties hereto and the purpose in the execution of this First Supplemental Operating Agreement that the New Companies, respectively, shall assume all the covenants and agreements contained in the Operating Agreement in favor of each other, in favor of the Old Companies, respectively, in favor of the Terminal Company and in favor of the Trustee Company, and that they shall, and do hereby, become parties to the Operating Agreement with like force and effect as if they had executed the same as parties thereto as of the date upon which the Operating Agreement was executed by the then parties thereto. The Old Companies, respectively, the Terminal Company and the Trustee Company do hereby reaffirm their covenants and agreements therein contained and extend the same to and with the New Companies, respectively, to the same extent and with like effect as though the New Companies had been parties thereto originally.

Fourth: The covenants and agreements hereof made by the parties of the second and third parts are several and not joint.

Fifth: This agreement is hereby transferred and assigned to the Trustees under the first mortgage of the Terminal Company to the same extent and with like effect as provided in Article V of the Operating Agreement.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents or Vice-Presidents thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested by their respective Secretaries or Assistant Secretaries the day and year above written.

[fol. 67] Kansas City Terminal Railway Company, by H. L. Harmon, Its President. (Seal.)

Attest: C. C. Ripley, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, by J. W. Kendrick, Its Vice President. (Seal.)

Attest: Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, Its President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, Its President. (Seal.)

Attest: Geo. H. Crosby, Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, Its President. (Seal.)

Attest: F. H. Hamilton, Secretary.

[fol. 68] Union Pacific Railroad Company, by R. S. Lovett, Its President. (Seal.)

Attest: Alex Millar, Secretary.

The Chicago and Alton Railroad Company, by Geo. H. Ross, Its Vice-President. (Seal.)

Attest: H. E. R. Wood, Assistant Secretary.

The Wabash Railroad Company, by F. A. Delano, Its President. (Seal.)

Attest: E. B. Pryor, Assistant Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, Its President. (Seal.)

Attest: C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

[fol. 69] Chicago, Burlington and Quincy Railroad Company, by D. Miller, Its Vice-President. (Seal.)

Attest: H. W. Weiss, Assistant Secretary.

Chicago Great Western Railroad Company, by S. M. Felton, Its President. (Seal.)

Attest: J. F. Coykendall, Secretary.

The Kansas City Southern Railway Company, by J. A. Edson, Its President. (Seal.)

Attest: R. J. McCarty, Assistant Secretary.

Illinois Trust and Savings Bank, as Trustee, by Frederick T. Haskell, Its President. (Seal.)

Attest: William H. Henkle, Secretary.

[fol. 70] STATE OF MISSOURI,
County of Jackson, ss:

On this 3rd day of March, in the year 1910, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri, that he is the President of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

[fol. 71] STATE OF ILLINOIS,
County of Cook, ss:

On this 30th day of March, in the year 1910, before me appeared J. W. Kendrick, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by

order of its Board of Directors, and that he signed his name thereto by like order; and said J. W. Kendrick acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

[fol. 72] STATE OF ILLINOIS,
County of Cook, ss:

On this 14th day of April, in the year 1910, before me appeared A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

[fol. 73] STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of April, in the year 1910, before me appeared H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by

order of its Board of Directors, and that he signed his name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois. My commission expires on the 15th day of August, 1911. (Seal.)

[fol. 74] State of Missouri,
City of St. Louis, ss:

On this 17th day of May, in the year 1910, before me appeared B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have herunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

[fol. 75] State of New York,
County of New York, ss:

On this 2nd day of June, in the year 1910, before me appeared R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of New York, in the State of New York; that he is the President of Union Pacific Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of

Directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1911. (Seal.)

[fol. 76] STATE OF ILLINOIS,
County of Cook, ss:

On this 19th day of April, in the year 1910, before me appeared George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is Vice-President of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Robt. J. Bell, Notary Public, Cook County, Illinois. My commission expires on the 23rd day of February, 1911. (Seal.)

[fol. 77] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said

F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De La Mater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 78] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of May, in the year 1910, before me appeared A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Dallas, in the State of Texas; that he is the President of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Claude O. Pearcy, Notary Public, City of St. Louis, Missouri. My commission expires on the 17th day of December, 1910. (Seal.)

[fol. 79] STATE OF MISSOURI,
City of St. Louis, ss:

On this 30th day of April, in the year 1910, before me appeared C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of St. Louis, in the State of Missouri; that he is the Vice-President of The Missouri Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order;

and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donevan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

[fol. 80] STATE OF ILLINOIS,
County of Cook, ss:

On this 28th day of April, in the year 1910, before me appeared D. Miller, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said D. Miller acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the third day of March, 1914. (Seal.)

[fol. 81] STATE OF ILLINOIS,
County of Cook, ss:

On this 24th day of February, in the year 1910, before me appeared S. M. Felton, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago Great Western Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto

by like order; and said S. M. Felton acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Charles G. Lavery, Notary Public, Cook County, Illinois. My commission expires on the 5th day of November, 1913. (Seal.)

[fol. 82] State of Missouri,
County of Jackson, ss:

On this 4th day of March, in the year 1910, before me appeared J. A. Edson, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of The Kansas City Southern Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. A. Edson acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Clarence R. Hall, Notary Public, Jackson County, Missouri. My commission expires on the 15th day of October, 1912. (Seal.)

[fol. 83] County of Cook,
State of Illinois, ss:

On this 2nd day of February, in the year 1911, before me appeared Frederick T. Haskell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of Illinois Trust and Savings Bank, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that such instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and

said Frederick T. Haskell acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Morris Berger, Notary Public, Cook County, Illinois.

My commission expires on the 26th day of May, 1912. (Seal.)

[fol. 84] EXHIBIT 2 TO PETITION

Statement showing amount of First Mortgage Bond interest of Kansas City Terminal Railway Company (less credits from operations) and its taxes for the year 1932 as charged to the proprietary and using companies on unit basis, and the amounts thereof chargeable to each if apportioned on ratio of use, determined from proportion of joint operating expenses charged to each during the year 1932.

	Bond interest	Credit from operations	Net	Taxes	As charged total	Percent of use based on aggregate jt. operating exp. paid 1932	Use basis proportion	Increase or decrease if apportioned on use basis
A. T. & S. F.	$165,821.03	$11,178.80	$154,642.23	$40,661.33	$195,303.56	26.06	$599,655.32	$404,351.76
Alton	165,821.02	15,558.59	150,262.43	40,661.33	190,923.76	4.95	113,902.30	Cr. 77,021.46
C. B. & Q.	165,821.02	14,734.20	151,086.82	40,661.33	191,748.15	8.60	197,890.86	6,142.71
C. G. W.	165,821.02	15,645.39	150,175.63	40,661.33	190,836.96	2.61	60,057.57	Cr.130,779.39
C. M. St. P. & P.	165,821.02	15,675.69	150,145.33	40,661.33	190,806.66	2.64	60,747.89	Cr.130,058.77
C. R. I. & P.	165,821.02	13,619.53	152,201.49	40,661.33	192,862.82	17.45	401,534.36	208,671.54
K. C. S.	165,821.02	15,669.35	150,151.67	40,661.32	190,812.99	2.24	51,543.67	Cr.139,269.32
M.-K.-T.	165,821.02	15,501.06	150,319.96	40,661.32	190,981.28	4.12	94,803.53	Cr. 96,177.75
Mo. Pac.	165,821.02	13,415.24.	152,405.78	40,661.32	193,067.10	16.77	385,887.17	192,820.07
St. L.-S. F.	165,821.01	15,227.78	150,593.23	40,661.32	191,254.55	3.86	88,820.78	Cr.102,433.77
Un. Pac.	165,821.01	15,129.35	150,691.66	40,661.34	191,353.00	6.60	151,869.73	Cr. 39,483.27
Wab.	165,821.01	15,376.69	150,444.32	40,661.35	191,105.67	4.10	94,343.32	Cr. 96,762.35
Total	$1,989,852.22	$176,731.67	$1,813,120.55	$487,935.95	$2,301,056.50	100.00	$2,301,056.50	

[fol. 85] EXHIBIT 3 TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY

Intervening Petition of Chicago Great Western Railroad Company

Now comes Chicago Great Western Railroad Company, a corporation, and respectfully represents that it has an interest in the matters in the litigation in the above entitled proceeding, and moves that it may be allowed to intervene in and become a party to said proceeding, and for cause of intervention says:

(1) Petitioner, Chicago Great Western Railroad Company, is a corporation organized under and by virtue of the laws of the State of Illinois, and is a common carrier of freight and passengers by railroad in interstate commerce, and as such, is subject to the provisions of the Act to Regulate Commerce and Acts amendatory thereof and supplementary thereto.

(2) Petitioner is a party to the agreement, dated January 24, 1910, supplemental to the operating agreement dated June 12, 1909, and referred to in the original petition and answer filed herein. Under and by virtue of said agreement, petitioner is a user of certain of the facilities of defendant herein and has paid in the past and is now paying to defendant the amounts representing petitioner's proportion of the cost of operation, taxes, insurance, interest and other charges of defendant. There is attached hereto and made a part hereof, marked Exhibit 1, a statement of the percentage of use of the facilities of defendant made by the parties to said operating agreements as compared with the percentage of total operating expense and total fixed charges required to be paid by each of such lines, including your petitioner, under the terms of the operating agreements dated June 12, 1909, and January 24, 1910, and referred to in the complaint and answer filed herein.

[fol. 86] (3) In the answer filed herein by defendant the jurisdiction of this Commission in this proceeding is questioned and the right of this Commission to grant such an order as is prayed for by complainant is denied. If, notwithstanding this, this Commission does take jurisdiction of the controversy and does grant to complainant the right to use the facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under the terms of said operating agreements, there will result a discrimination against your petitioner, in that complainant will have the same rights in the Kansas City Terminal as your petitioner, but will secure such rights upon the payment of a less sum relatively than your petitioner will be required to pay. Any order so entered by this Commission granting complainant the right to use such facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under said operating agreements, will also result in an increase in the amounts which your petitioner will thereafter be required to pay under the terms and conditions of said operating agreements. Your petitioner further says, that if complainant is granted the right to use the facilities of defendant, the compensation therefor to be fixed by this Commission in any amount less than the amounts which complainant would be required to pay under said operating agreements, then that your petitioner is entitled to the same right and that any order entered herein granting said right to complainant, should also grant similar relief to your petitioner.

Wherefore, said Chicago Great Western Railroad Company, prays leave to intervene and be treated a party hereto with the right to have notice and appear at the taking of testimony, produce and cross-examine witnesses and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, this 14th day of May, A. D. 1924.

Chicago Great Western Railroad Company, by Ralph M. Shaw, Frank H. Towner, Its Counsel.

[fol. 87] EXHIBIT 4 TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY

Petition for Leave to Intervene of the Kansas City Southern Railway Company

Comes now The Kansas City Southern Railway Company, herein called the Intervener, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and desires to intervene and become a party to said proceeding, and for grounds of the proposed intervention says:

Your Intervener is a Missouri corporation existing under and by virtue of the laws of the State of Missouri, with its principal office, and northern terminus, at Kansas City, Missouri. It is a common carrier engaged in the transportation of passengers and property wholly by railroad between points in the states of Missouri, Kansas, Arkansas, Oklahoma, and Louisiana, and, in connection with its affiliated company, the Texarkana and Fort Smith Railway Company, through passenger and freight trains are operated to Port Arthur, Texas, on the Gulf of Mexico. As such common carrier Intervener is subject to the provisions of the Interstate Commerce Act.

By the application of Missouri-Kansas-Texas Railroad Company filed herein it invokes the jurisdiction of this Commission and seeks affirmative relief under the provisions of paragraph 4 of Section III of the Interstate Commerce Act, as amended by the Transportation Act, 1920. The answer filed by Kansas City Terminal Railway Company to the application aforesaid challenges the jurisdiction of the Commission to grant the relief prayed or any relief under said application either under said paragraph 4, Section III of the Interstate Commerce Act, or otherwise, upon the numerous grounds stated in said answer. If the

[fol. 88] issues thus joined are resolved by the Commission in favor of its jurisdiction, and if the Commission assumes jurisdiction to act in the premises and grants the relief prayed or other relief to said Missouri-Kansas-Texas Railroad Company, Intervener states that it is entitled to relief in respect of its relations to the use by Intervener, and the burdens attending such use, of the terminal facilities of said Kansas City Terminal Railway Company upon the facts hereinafter stated.

Your Intervener has been and is now using the Union Passenger Station and certain portions of the passenger and freight terminal facilities of the Kansas City Terminal Railway Company, herein called the Terminal Company, at Kansas City, Missouri, described in the petition of the Missouri-Kansas-Texas Railway Company, herein called the Petitioner, and is making payment to said Terminal Company therefor in accordance with the terms of the contract between the Terminal Company and the proprietary companies (of which your Intervener is one) dated June 12, 1209, known by the parties thereto as the Operating Agreement, and the contract supplemental thereto, dated January 24, 1910, which said contracts are mentioned and referred to in the petition of said Petitioner.

Your Intervener says that prior to its becoming a party to said Operating Agreement it had, at large expense, constructed a Union Station at Second and Wyandotte Streets upon its own lines in Kansas City, Missouri, which station was amply sufficient for the use of your Intervener and of certain tenant railroad companies. Your Intervener's station was within four blocks of the City Hall in Kansas City, Missouri, and as close to the business center of Kansas City, Missouri, as the present Union Station of the Kansas City Terminal Railway Company. One street car line ran directly to it; another street car line ran within two blocks of it; and other lines were within three or four blocks of it. Although there was no practical necessity therefor, your Intervener discontinued the use of said station and entered into said Operating Agreement with the Kansas City Terminal Railway Company because of the public demand that all of the railways of Kansas City should use one Union Station.

[fol. 89] The proportions in which the proprietary companies, and the M-K-T Railroad Company, used the facili-

ties of the Kansas City Terminal Railway Company, during the year ended December 31, 1923, together with the amounts borne by each company, of the expenditures of the Terminal Company, are shown on a statement attached and made a part hereof, marked Exhibit "A".

The percentage of use of all the facilities of the Terminal Company, and the percentage of fixed charges of the Terminal Company, borne by each of the said tenants, as shown by the said Exhibit A, are, for the year 1923, as follows:

	Percentage of use of passenger station facilities	Percentage of use of all facilities of Terminal Co.	Percentage of fixed charges borne by each company
A. T. & S. F.	29.60	26.06	8.58
C. & A.	4.26	6.37	8.33
C. B. & Q.	10.19	10.49	8.36
C. G. W.	1.79	1.56	8.24
C. M. & St. P.	2.29	2.72	8.25
C. R. I. & P.	13.84	15.13	8.44
K. C. S.	2.10	2.22	8.24
M-K-T.	3.49	4.34	8.27
Mo. Pac.	16.36	16.37	8.44
St. L.-S. F.	6.88	5.15	8.28
Union Pac.	5.09	5.47	8.30
Wabash	4.11	4.12	8.27

(The percentages shown in the first column are taken from the Annual Report of the Kansas City Terminal Railway Company for the year 1923, and the percentages shown in the other columns are taken from the said Exhibit "A".)

As will be noted, while your Intervener's use of all the facilities of the Terminal Company, during the year 1923, averaged 2.22 per cent, the proportion of the fixed charges of the Terminal Company which was borne by your Intervener was 8.24 per cent.

Intervener's proportion (the figures which follow are taken from Exhibit "A"), on the basis of use, of the net fixed charges of the Terminal Company, that is, 2.22 per cent of $2,207,018.35, is $48,995.81, whereas the proportion actually borne by Intervener was $181,884.70.

Intervener's proportion, on the basis of use, of the net total of fixed charges and operating expenses of the Terminal Company, 2.22 per cent of $4,784,062.47 is $106,206.19, whereas the amount actually borne by it was $239,050.25.

[fol. 90] Your Intervener further says that its revenue from passengers into and out of the Union Station at Kansas City, Missouri, for the year 1923 was as follows: outbound $351,485.13; inbound $433,538.58; total $785,023.71. Your intervener's ratio of operating expenses to passenger revenue for the year 1923, computed on formulæ approved by this Commission, was 87.68 per cent. Applying this ratio to your Intervener's passenger business into and out of the Union Station at Kansas City, Missouri, your Intervener's net revenue from such passenger business would be $96,714.93. Yet, as stated above your Intervener's proportion of the fixed charges of the Terminal Company is $181,884.70, and its proportion of all charges is $239,050.25, amounts far in excess of its entire net revenue from the passenger traffic accommodated by the said station, and the passenger facilities of the Terminal Company are the facilities of that Company chiefly used by Intervener, since it has extensive freight terminals, and connections, of its own.

Intervener states that the above amounts are out of proportion to the use enjoyed by it of the said facilities, and constitute a heavy and undue burden upon its traffic.

Intervener further says that the figures for the year 1923 as typical of the situation for other years. As is shown by the said Exhibit "A", in the case of other small users, there is equal or greater disproportion between their use of the said facilities and the amounts borne by them.

On the other hand, as is shown by the said Exhibit, some of the companies require and enjoy a much larger proportion of the use of the Terminal Company's facilities, and bear a much smaller relative proportion of the expenses of the Terminal Company.

The cost of the facilities of the Terminal Company has been much greater than was estimated at the time when the contracts, above referred to, were entered into. The result has been that the amount of taxes, assessments and interest, which, under the above contracts, are borne in the proportion of one-twelfth, each, by the twelve com-

panies, is substantially greater than was anticipated, and has made the amounts borne by the small users entirely disproportionate to, and much greater than, the proportions of their use of the facilities. The burden upon the [fol. 91] relatively small users of the property, of which the Intervener is one, has been much greater than was anticipated by them, and the expense constitutes a heavy drain upon their revenues.

Efforts have been made by the proprietary companies to agree upon an adjustment between themselves which would distribute the expenses of this Terminal Company upon the basis of the use of those facilities by each company, or some other equitable basis, but, although the great majority of the said companies, including some of the large users, have been willing to make an adjustment, it has been impossible to secure unanimous consent thereto.

The development of the facilities of the Terminal Company, and the fulfillment of its franchise obligations, are embarrassed and delayed by this disagreement as to an adjustment of the proportions in which the expenses of the Terminal Company shall be borne.

On account of this failure to reach such an adjustment, the M-K-T Railway Company, which purchased, at foreclosure, the property of the M. K. & T. Railway Company, has withdrawn from, or refused to adopt, the said contracts, and the courts have held that the said agreements are not binding upon it.

The granting, however, of the petition of the M-K-T Company, upon the terms asked by it in the said application, without making an adjustment as to the other companies, will not only not settle the matter, but will aggravate it.

The said operating agreement between the Kansas City Terminal Railway Company and the proprietary lines, of which Intervener is one, provides in sub-paragraph (f) of Section 1 of Article 2 as follows:

"In case any of the Railway Companies shall make default in the payment of any sum which under the provisions of this section shall be payable by such Railway Company, then the sum which such Railway Company in default failed to pay shall be apportioned equally among the other Railway Companies or the one of them not in default, and each of such other Railway Companies, or the

one (as the case may be), shall pay a ratable (or the whole) share of such sum forthwith upon demand of the Terminal Company, or, if the Terminal Company be in default, as [fol. 92] hereinafter specified, under its said First Mortgage, then upon demand of the Trustee Company."

If, therefore, the Missouri-Kansas-Texas Railway Company, and, it may be added, the Chicago & Alton Railroad Company, which is now in the hands of a Receiver, are permitted to use these terminals upon a user basis, without changing the existing arrangement as to the other companies, the extremely heavy burdens now resting upon the Intervener, and other small users, will be largely increased, and there will be a still greater discrepancy between the proportions paid by them, for the use of the facilities, and the proportions in which they use the said facilities.

In fact, it is not unlikely that the burden may become greater than some of the others of said small users are able to bear.

If the said Operating Agreement is unjust, inequitable and burdensome to the Petitioner, as charged by it, and as the Intervener believes it to be, it is equally or more ununjust, inequitable and burdensome to your Intervener, and to others of the small users of the said facilities, and the granting, only to petitioner, of the relief prayed for by it, will make said agreement still more unjust, inequitable and burdensome to Intervener, and said other small users, since the latter will have to bear their proportions of the alleged unjust, inequitable and burdensome charges which will thereby be saved by said Petitioner.

Intervener further alleges that the said Operating Agreement, as to Intervener and other small users, is discriminatory and contrary to the public interest, in violation of the Interstate Commerce Act and especially Section 3 thereof, and that if the relief prayed for by the M-K-T Railway Company is granted, it will become even more discriminatory and contrary to the public interest, as to the said small users.

Your Intervener, therefore, prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argu-

ment is granted, and if the Commission resolves the issue of jurisdiction presented by the application of Petitioner and the answer of the Terminal Company in favor of such [fol. 93] jurisdiction and assumes jurisdiction in the premmises, that the Commission enter upon an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and the terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties.

Dated at Kansas City, Missouri, this — day of May, 1924.

The Kansas City Southern Railway Company, Kansas City Southern Building, 11th & Wyandotte Streets, Kansas City, Missouri, by —— ——, Its ——. —— ——, 306 Kansas City Southern Building, Kansas City, Missouri, Attorneys for Intervener.

[fol. 94] EXHIBIT 5 TO PETITION

10842

INTERSTATE COMMERCE COMMISSION

No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

v.

KANSAS CITY TERMINAL RAILWAY COMPANY

Submitted July 10, 1925. Decided November 10, 1925

Upon petition by Missouri-Kansas-Texas Railroad Company seeking the entry of an order, pursuant to section 3 (4) of the interstate commerce act, according petitioner the right to use, upon compensation determinable wholly upon a user basis, designated portions of the union passenger and freight terminals at Kansas City, Mo.-Kan., owned and operated by respondent Kansas City Terminal

Railway Company, and upon intervening petitions by certain so-called small-user proprietary lines seeking similar relief as to terms, Found:

1. The intervening small users, parties to the operating agreement governing the use and operation of the terminals and entitled thereunder and as proprietaries to use thereof, are not within the contemplation of section 3 (4) of the act, and as to them this commission is not thereby or otherwise empowered to grant the relief sought. Contract division of interest and taxes not shown to be unduly prejudicial or preferential or unjustly discriminatory. Intervening petitions dismissed.

2. If, in a cause now pending in the Federal courts, the Missouri-Kansas-Texas Railroad Company shall be finally adjudged to be bound by the operating agreement, relief can not be granted; if adjudged not to be so bound, further proceedings may be had looking to the entry of an order according petitioner a right of user, and thereupon, if the parties can not agree, a determination of the terms thereof and the compensation to be paid or secured therefor, in accordance with the provisions of the act.

Joseph M. Bryson and C. S. Burg for petitioner.

Samuel W. Sawyer and Richard S. Righter for respondent.

T. J. Norton for Atchison, Topeka & Santa Fe Railway Company; Bruce Scott, Walter McFarland, and Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; Wallace T. Hughes and W. F. Dickinson for Chicago, Rock Island & Pacific Railway Company; Edward J. White and Thomas Hackney for Missouri Pacific Railroad Company; H. A. Scandrett, N. H. Loomis, and C. B. Matthai for Union Pacific Railroad Company; Silas H. Strawn, Ralph M. Shaw, and Frank H. Towner for Chicago & Alton Railroad Company and receivers and Chicago Great Western Railroad Company; Frank H. Moore and A. F. Smith for Kansas City Southern Railway Company; [fol. 95] E. T. Miller and M. G. Roberts for St. Louis-San Francisco Railway Company; J. N. Davis for Chicago, Milwaukee & St. Paul Railway Company; and N. S. Brown and L. H. Strasser for Wabash Railway Company, interveners.

Report of the Commission

McManamy, Commissioner:

Exceptions to the report proposed by the examiner, and replies to certain of the exceptions, have been filed by various parties, and the issues have been argued on briefs and orally. With some amendments of his grounds therefor, we reach the conclusions proposed.

The proceeding arises upon a petition by the Missouri-Kansas-Texas Railroad Company, which seeks the entry of an order by us, pursuant to the provisions of section 3, paragraph (4), of the interstate commerce act, according petitioner the right to use, upon equitable terms, designated portions of the union passenger and freight terminals at Kansas City, Mo.-Kans., owned and operated by the respondent Kansas City Terminal Railway Company. In the petition, filed March 10, 1924, it is alleged, in substance and with a conceded correction, that the terms imposed upon petitioner for its present use of the terminals are unjust, inequitable, and burdensome in that, under the operating agreement hereinafter more fully outlined and agreeably with which petitioner's present use is enjoyed, each of the proprietary lines parties thereto is required to pay one-twelfth of the interest on respondent's bonded indebtedness and one-twelfth of the taxes payable by respondent, without regard to the use of the terminals made by each proprietary company. It is further alleged that the petitioner, which purchased at judicial sale most of the railway lines of the former Missouri, Kansas & Texas Railway Company and the line of the Wichita Falls & Northwestern Railway Company, is a small user of the terminal facilities, and that its payments for interest and taxes are out of proportion to its use; wherefore petitioner has elected not to become one of the proprietaries of the respondent company or to adopt the operating agreement to which the first named of its predecessors was a party, and has given respondent appropriate notice thereof. The prayer for permanent relief is that we shall prescribe, upon a user basis, the terms upon which petitioner shall have the right henceforth to use portions of the terminals, including main-line tracks, lying within certain zones designated by numbers and hereinafter more fully described.

Pending final disposition, and by service order No. 40, entered March 27, 1924, pursuant to section 1, paragraph (15), of the act, upon a further prayer of the petitioner and [fol. 96] for cause shown, we ordered that, effective April 1, 1924, and until our further order, respondent permit petitioner to use the said terminals, including main-line tracks for a reasonable distance outside, lying within the specified zones, upon the terms and provisions of the said operating agreement and for the compensation therein provided; payments in accordance therewith, however, not to be the final measure of compensation for use during the period the service order shall be in effect, the total compensation ultimately to be paid for that period to be upon such terms as the carriers may agree, or, failing such agreement, as we may, after subsequent hearing, find to be just and reasonable.

In due course respondent filed a plea to our jurisdiction in the premises and a motion to dismiss the petition, together with an answer on the merits.

In respect of the prayer for the service order the grounds set up in support of the plea and motion are (a) that there is no emergency within the meaning of section 1 (15) of the act, since petitioner has had the right to use the terminal facilities by adopting the operating agreement to which its predecessor was a party, and the condition which impels petitioner to ask for the order is the result, not of an emergency existing in any part of the country within the contemplation of the section cited, but of petitioner's voluntary act and unreasonable delay; (b) that the section in question, if interpreted to admit of or to require such an order in this case, deprives respondent of its property without due process of law, in violation of the fifth amendment to the Constitution of the United States, and of the right of trial by jury, in violation of the seventh amendment to the Constitution; (c) that section 1 (15) is violative of the fifth and seventh amendments in that it provides for an ascertainment of compensation by this commission, without provision for a judicial ascertainment of such compensation and for trial by jury of the amount of compensation to which the railroad company affected may be entitled; and (d) that the section in question applies only to trunk-line railroads, and does not authorize an order empowering a railroad company to use the station and terminal facilities

of a terminal company organized and maintained as a joint facility.

In respect of the permanent relief sought by petitioner, the grounds set up in support of the plea to the jurisdiction and the motion to dismiss are:

(a) That section 3 (4) of the act does not authorize us to require a terminal company owning a station and terminal facilities, constituting itself a joint facility, to permit the use of its facilities by the successor of a proprietary company, or the purchaser at foreclosure sale of such proprietary company's property, unless such successor or pur- [fol. 97] chaser shall agree to adopt and be bound by the contracts and terms which bound its predecessor;

(b) That the said section of the act, if interpreted to authorize us to require the use of respondent's facilities by petitioner, is unconstitutional and void and in violation of the fifth and seventh amendments to the Constitution;

(c) That we have no power or jurisdiction to disturb, change, or affect existing contract relations between petitioner and respondent and no power to permit petitioner or any other railroad company to use respondent's terminal facilities upon terms constituting a discrimination against the other users of the facilities;

(d) That there is now pending in the United States Circuit Court of Appeals for the Eighth Circuit a certain cause in which is involved a question of the fairness, as to respondent, of the offer made to creditors by the reorganization managers who caused the organization of the petitioner, as a result of which, if the decision be favorable to respondent, the petitioner will be absolutely bound by the provisions of the aforesaid operating agreement, and that we have no power to make any order in the premises which would change the relations between the parties as so determined, or any order in the matter whatsoever pending the determination of the cause in the said court;

(e) That section 3 (4) applies to trunk-line railroads only and does not authorize an order for the use by a railroad company of the station and terminal facilities of a terminal company or an order prescribing compensation for such use.

Petitions in intervention were severally filed by the 11 remaining proprietary lines, namely, Atchison, Topeka & Santa Fe Railway Company, hereinafter called Santa Fe; Chicago, Burlington & Quincy Railroad Company, hereinafter called Burlington; Chicago, Rock Island & Pacific Railway Company, hereinafter called Rock Island; Missouri Pacific Railroad Company, hereinafter called Missouri Pacific; Union Pacific Railroad Company, hereinafter called Union Pacific; Chicago & Alton Railroad Company and its receivers, hereinafter called Alton; Chicago Great Western Railroad Company, hereinafter called Great Western; Kansas City Southern Railway Company, hereinafter called Kansas City Southern; St. Louis-San Francisco Railway Company, hereinafter called Frisco; Chicago, Milwaukee & St. Paul Railway Company, hereinafter called Milwaukee; and Wabash Railway Company, hereinafter called Wabash.

The Santa Fe, Burlington, Rock Island, Missouri Pacific, and Union Pacific, more or less generally referred to of record as the large users of the terminals, intervened in [fol. 98] opposition to the relief sought by petitioner. The others, likewise referred to as the small users, intervened to obtain the same relief as to terms that petitioner seeks, and incidentally urge that to grant such relief to petitioner alone would only aggravate the present situation and unlawfully discriminate against the other users of the terminals. The Santa Fe also filed a motion to dismiss the initiatory petition, upon the grounds (a) that it seeks the reformation of a contract, which is within the exclusive province of a court of equity; (b) that to assume to grant the relief sought would cast upon that intervener and others having proprietary interests a financial burden wholly different from that contemplated in the execution of the operating agreement; and (c) that such action would be in direct conflict with the ordinances of Kansas City, Mo., enacted in aid of the creation of the terminal facilities and for the financial protection of the proprietary companies which undertook the task of providing adequate facilities for the public.

Respondent filed motions to strike the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, and Milwaukee, upon the grounds (a) that the said petitions unduly broaden the issues raised by the initiatory petition and the answer thereto; (b) that in effect

the intervening petitions ask for the reformation of a contract, or for the modification or nullification thereof, and that we have no such power; (c) that neither section 3 (4) nor any other provision of the act empowers us to modify, supersede, nullify, or ignore existing contracts between carriers concerning the use of terminal facilities; (d) that if section 3 (4) or any other act of Congress may be interpreted to confer upon us any such power, it is unconstitutional and void and in violation of the fifth amendment to the Constitution; (e) that we have no power to reform contracts, such power being vested in courts of equity of the United States, subject to the well-recognized principles of law and equity applicable thereto; and (f) that an order granting the prayers of the interveners would operate to deprive respondent of its property without due process of law, in violation of the Constitution, would be beyond our jurisdiction and power, and is not authorized by section 3 (4) or by any other act of Congress.

While a like motion to strike the intervening petition of the Alton was not interposed, apparently because that petition did not ask for specific relief, the same objections would apply and have been made to the relief sought under it; a relief vigorously urged throughout the proceeding in the Alton's behalf and as vigorously opposed throughout by respondent and those interveners which make common cause with it. Beyond filing its intervening petition and entering an appearance, the Milwaukee has taken no active [fol. 99] part in the case. Although we entered orders granting leave to intervene, except as to the Union Pacific, which intervened at the hearing, further consideration of the plea to the jurisdiction and of the motions to dismiss and to strike was not foreclosed and was merely postponed to the consideration of the case on the merits.

A preliminary brief history of the union terminals will lay the foundation for a clearer understanding of the present controversy.

For some time prior to 1906 (disregarding here, for convenience, reorganizations except as indicated) the Santa Fe, Rock Island, Milwaukee, Burlington, Frisco, Union Pacific, Missouri Pacific, Alton, Wabash, and the former Missouri, Kansas & Texas Railway Company, the latter hereinafter called the old company, had used for their passenger trains the so-called old union depot at Kansas City, situated near the Missouri-Kansas boundary line, on the

Missouri side. The Kansas City Southern then occupied its own station, situated elsewhere, with the Great Western as a tenant. The union depot was inadequate, and there had been an active and growing public demand, and some agitation among the carriers themselves, for the construction of better facilities. Negotiations by the carriers to that end were accordingly begun, pertinent details of which and of other steps in the consummation and conduct of the project will be commented upon as occasion may suggest. Suffice it to say for the moment that the negotiations culminated as follows:

In 1906 the above-named 10 lines which used the old union depot caused to be organized the respondent corporation, under the laws of Missouri—originally with an authorized capitalization of $30,000,000, but increased to $50,000,000 the following year—as a common carrier by railroad, with appropriate powers, and at all times since subject to all appropriate provisions of the act. Of its authorized capital stock $1,000,000 was then subscribed and paid for in equal amounts by the promoting lines. Its directorate is composed of a representative of each of the proprietaries.

June 7, 1909, an ordinance was approved by the common council of Kansas City, Mo., which provided, in furtherance of the terminal project, for the vacation of certain streets and alleys in the city, the construction and maintenance by respondent of viaducts and subways over and under the existing and projected terminal tracks, and for other kindred matters, granted rights of way and franchise rights to respondent, provided for assignment to respondent of rights, franchises, privileges, and immunities outstanding in the Kansas City Belt Railway Company, etc. Among other details, it prescribed certain governing terms, including an observance of the operating agreement, to be entered into, in the use and operation of the new terminals [fol. 100] not only by respondent and the then proprietary lines but also by any line thereafter to be admitted. This ordinance, as amended August 19, 1911, in some minor respects, and embracing an effective period of 200 years, is the franchise ordinance before referred to; and sections 12 and 27 thereof, presently to be considered, bear directly upon the merits of this proceeding. The ordinance was submitted to the qualified voters of the city at an election

held for the purpose and ratified by them. Pursuant to its provisions, it was accepted in writing by respondent, and each proprietary line filed its written acceptance in the from prescribed by section 27, binding itself to observe the provisions thereof.

June 12, 1909, an agreement was entered into by and between respondent, the aforesaid 10 lines, and the Illinois Trust & Savings Bank as trustee, with mutual covenants relating to the construction, maintenance, use, operation, and management of the new union passenger station and other terminal facilities. This agreement was supplemented, January 24, 1910, by the inclusion of the Kansas City Southern and Great Western on equal terms with the original proprietary lines. The original and supplemental agreements comprise what is known and herein referred to as the operating agreement. Among its various provisions, the respondent grants to each proprietary line the right to operate its trains upon and over the unified passenger and frieght terminals for a period of 200 years.

Also on June 12, 1909, a stock-trust agreement was entered into between respondent, the then 10, later 12, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of respondent's capital stock owned by the proprietary lines, and of such further shares as should be offered to and subscribed for by those lines from time to time, to the trust company, in trust, for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provision against acquisitions of such stock by outside interests. The trustee is required, upon request, to furnish proxies to the proprietaries to enable them to vote at stockholders' meetings.

Respondent acquired the real estate necessary for the construction and unification of the passenger and freight terminals in accordance with the plans ultimately adopted, secured contracts for the acquisition of the captial stock of the Kanasa City Belt Railway Company and the former Union Depot Company, later acquired the physical properties of those companies, and took other steps essential or appropriate to the consummation of the project. Work was begun and prosecuted, with the result that the new union passenger station was opened for business November 1, 1914, and the joint-terminal facilities were made ready for use and operation as such.

[fol. 101] The terminal arrangement and the present zoning of the terminals are portrayed by the map or diagram which accompanies this report, reproduced from one of the exhibits of record. As will be observed, two portions of the terminal layout are shown upon enlarged scales and in greater detail in the inserts A and B at either side of the map. The points of the compass are not given, but, as indicated by the course of the Missour-Kansas boundary, the top of the map is north. The heart of the mercantile and office district is within the large loop and generally northward of the union station, the principal residential portions of the city lying southward of the station. An important, and perhaps the principal, industrial district, embracing packing plants, elevators, manufactories, etc., lies to the west, in the so-called West Bottoms, along the Kaw River, in the neighborhood of the State line.

The division of the unified terminal facilities into zones, numbered from 1 upward, as shown by the map, is made, as provided in the operating agreement, for the purposes of the necessary accounting between respondent and the lines which use different portions of the terminals, and is subject to such change from time to time as may be desirable or necessary. For present purposes the numbered zones afford convenient means of identification. At the hearing respondent's witnesses described the terminal construction, arrangement, and use in considerable detail, and some of the more general features of the layout may appropriately be referred to at this point.

Zone 6 embraces the union passenger station and appurtenant tracks, something over 18 in number. The station is used by all the carriers, at present including petitioner, and the operating agreement provides, as the franchise ordinance prescribed, that the station shall be so used for all inbound and outbound passenger trains, except suburban trains. Zone 5 is a four-track line extending northeastward from the McGee Street freight station and yards, adjoining the passenger station zone, to Sheffield, on the west bank of the Blue River, where connections are made with the Frisco, Missouri Pacific, and Milwaukee. Two tracks, zoned as shown on the map, extend thence across the river to connections with the Santa Fe and Kansas City Southern, and thence farther east to Rock Creek Junction, near the city limits, where connection is made with the Alton and

again with the Missouri Pacific. From the latter junction to the union station the distance approximates 6.5 miles; and between the connection with the Alton on the east and the State boundary on the west the line follows what form- [fol. 102] erly was the double-track of the Kansas City Belt Railway. Beginning at Rock Creek Junction and extending thence in a northwesterly and then a southwesterly direction, along the foot of the bluffs in that part of the city, to a track connection at the south end of the so-called Hannibal bridge, is what is known as the north-end freight line, in all about 6.5 miles in length. As the map discloses, it includes several zones. For most of the distance the line embraces two tracks, one used for part of the distance belonging to the Alton. Near the eastern extremity of the terminals the two principal lines are further united by the so-called Coburg connection, zone 32. The bridge tracks curving sharply to the southwest at the south end of the Hannibal bridge, embraced in zone 20, comprise the familiar Burlington gooseneck, over which respondent has trackage rights. The loop is completed by a double-track line, including the west-bluffs passenger line in zone 37, extending southwestward along the foot of the bluffs bordering the West Bottoms and the curving to the east to enter the union station. The old union depot stood at a point on what is now zone 19.

About a half mile to the southwest of the union station, within the area embraced in insert A, are the terminal coach yards and engine house and yards, with various appurtenant facilities, where the equipment of some of the lines is cleaned and otherwise, except as to heavy repairs, kept in condition for service. The Sante Fe, Milwaukee, and Frisco do not use the coach-yard facilities except in emergencies, and the Santa Fe, Burlington, Milwaukee, Frisco, and Union Pacific do not use the roundhouse and engine yard, but handle their equipment with their own facilities. As the map further shows, the terminals extend across the State line and the Kaw River into Kansas City, Kans., details of which appear in insert B. The river is crossed by the so-called high line, which, including the bridge and approaches, is a double-deck steel and concrete structure, with two tracks on each deck. The upper deck, which is zone 55, is used exclusively for passenger trains, and the lower deck, or zone 9, is used for freight. In the

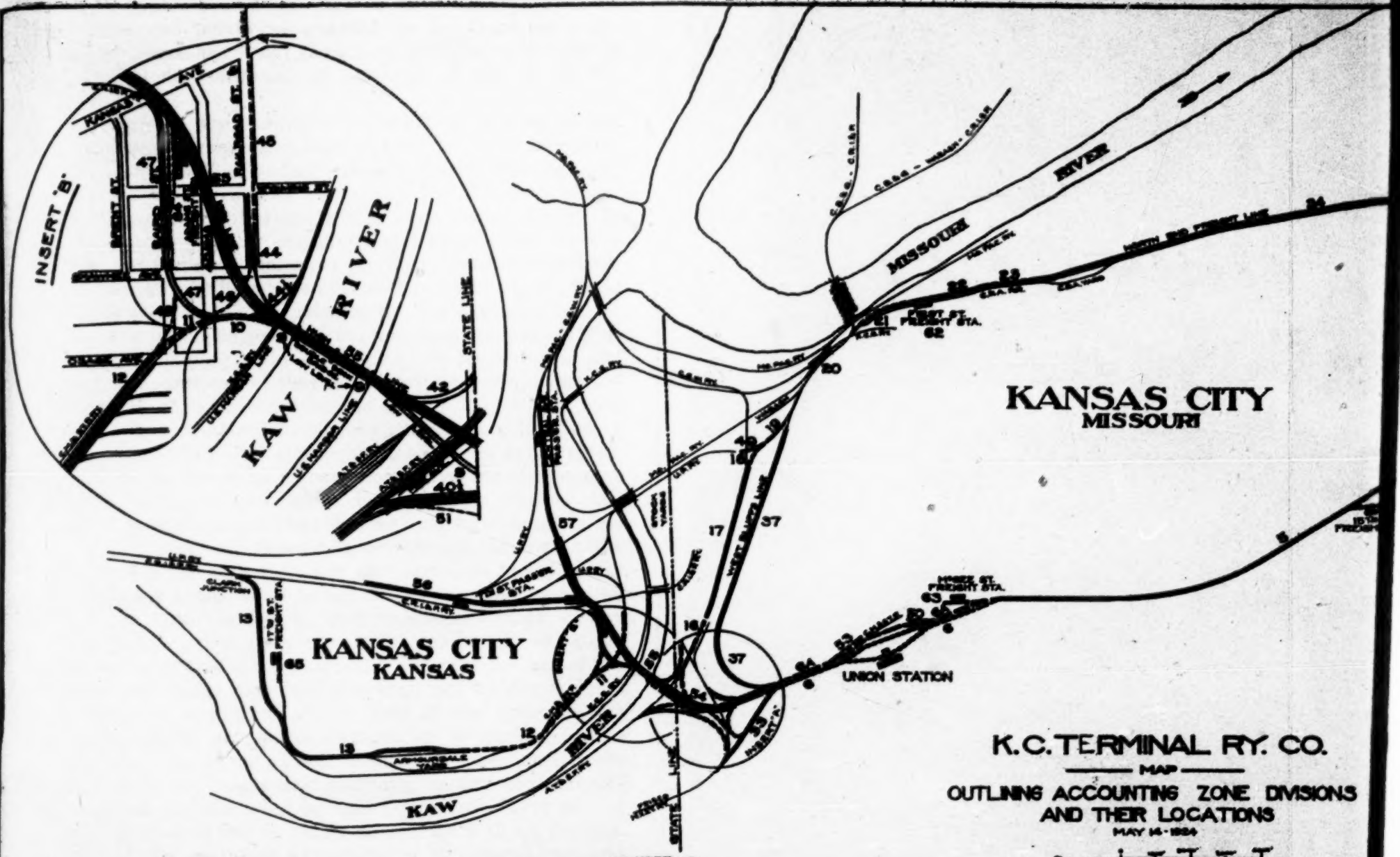
terminals as a whole respondent operates a total of 172 and a fraction miles of track, of which 148 and a fraction miles are owned by it, and reaches 208 industries with its rails. With its own motive power it performs switching services for the using lines and locally for industries. It also maintains and operates a number of freight stations and substations, through which traffic of the various carriers is handled. Some freight yards and team tracks are operated by respondent, and others are maintained and operated by the carriers. Respondent also maintains two passenger stations on the Kansas side, one used by the [fol. 103] Union Pacific and Rock Island and the other by the Missouri Pacific and Great Western and for all classes of passenger service.

The line over the Hannibal bridge and thence over the west-bluffs line to the union station is used by the Burlington, Wabash, and Rock Island. The Missouri Pacific, Union Pacific, Great Western, and Rock Island enter from the Kansas side by way of the high line. The Frisco has one line from the southwest, a short section of which, as it crosses the State line and connects with zone 33, is shown on the map. The Missouri Pacific, Alton, Santa Fe, Kansas City Southern, Rock Island, Milwaukee, and Frisco use zone 5 in the operation of their passenger trains. Santa Fe freight trains operate over that zone, using zone 6a past the union station. As indicated, some of the carriers use more than one route into or through the terminals. The north-end freight line is used exclusively for that service and principally by the Alton. All of the terminal main lines are available to all the carriers under reasonable regulations, and the facilities are joint in the fullest sense. While much more detail is covered in the record, such as points of interchange with the several carriers, zones respectively used, and other things, the foregoing outline is sufficient for present purposes.

Petitioner approaches Kansas City from the southwest, and operates from Paola, Kans., into the city, a distance of about 40 miles, over the line of the Frisco under a long-time trackage contract. It owns and maintains extensive freight yards and facilities at Rosedale, Kans., known as its Glen Park yards, about 1.25 miles distant from the union station, and a freight station in the West Bottoms east of the State line. The portions of the terminal facilities specified in its petition, the use of which it desires as a tenant

only and upon the terms indicated, are zones 5, 6, 6a, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 33, 33a, 34, 35, 36, 38, 39, 40, 40½, 41, 42, 43, 43½, 44, 44½, 45, 46, 47, 48, 49, 50, 53, 60, 61, 62, 63, 64, and 65.

As appears from what has been stated, the intervening so-called small users seek directly at our hands, and as far as terms are concerned the petitioner seeks the practical equivalent of, relief from the provisions of the operating agreement in so far as interest on respondent's bonded indebtedness and taxes payable by respondent are thereby apportioned among the using lines in equal parts, regardless of individual uses of the terminals by those lines. Respondent and the remaining interveners, on the other hand, rely upon the franchise ordinance and the operating agreement as interposing effectual barriers to any such relief. The provisions of those instruments thus drawn in question will therefore now be outlined.



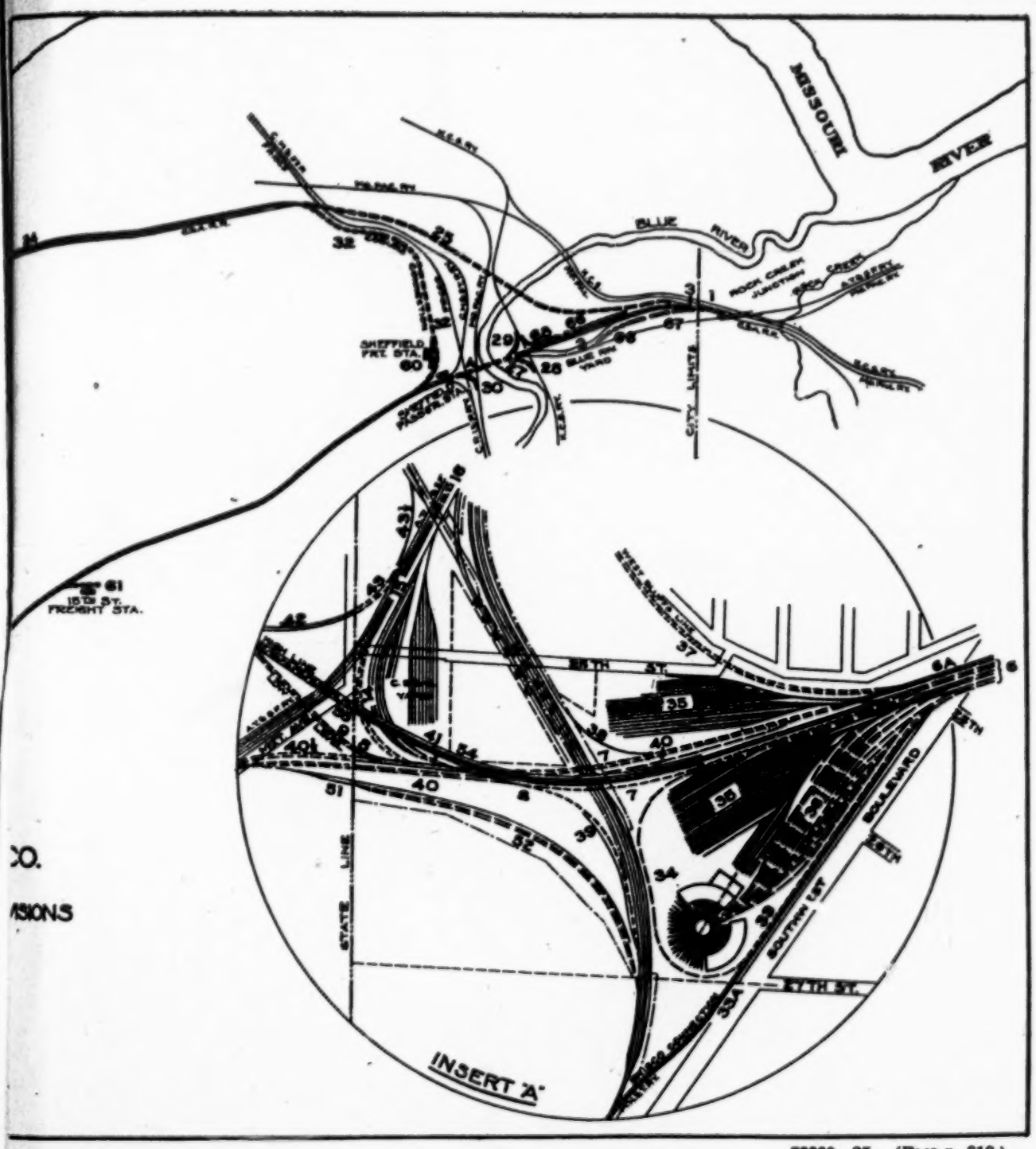
K.C. TERMINAL RY. CO.

MAP

OUTLINING ACCOUNTING ZONE DIVISIONS AND THEIR LOCATIONS

MAY 14 - 1924

Scale



73380—25. (Face p. 212.)

The pertinent conditions imposed upon the enjoyment of the rights and privileges granted by the franchise ordi-
[fol. 105] nance are, other than as to acceptance in writing by respondent, contained in sections 12 and 27 of the ordinance.

In substance, the conditions imposed by section 12 are that the union passenger station and the railroad tracks and other facilities affording entrance thereto shall be open to the use of all railway companies for their passenger trains, all, except suburban trains, to be operated into the union station; that no company shall be admitted to the station and facilities connected therewith until it shall have filed with the city its written consent to be bound by those provisions of section 27 relating to the operation of respondent's tracks as parts of the admitted company's line, upon the happening of the contingency set forth in that section, to the same extent that the constituent companies are bound, subject to the conditions of section 12; that the four main tracks authorized to be constructed upon the line of the Kansas City Belt Railway shall, so far as constructed, be open to the use of all railway companies for the passage of their freight trains drawn by their own engines and manned by their own crews; that any railway company acquiring, by contract, ownership, or through the courts, the right to use the union station and terminal facilities for its passenger trains shall be entitled to the same operating rights for both its freight and passenger trains as the constituent or proprietary companies, subject to reasonable and nondiscriminatory regulations; and that the use of the station and tracks and facilities shall not be available to any company organized at the date of the ordinance or thereafter to be organized, engaged or to engage, as the successor of any of the named proprietary companies, in the operation of the tracks and railways, or any part thereof then owned and operated by said proprietaries, or any of them, which shall fail or refuse to comply with all the conditions of the operating agreement to be entered into and filed with the city clerk. The section also makes provision for an application, by any carrier entitled to the use of the station, tracks, and facilities in connection therewith, or to the use of the aforesaid four main tracks for passage of its freight trains, to any court of competent jurisdiction in Jefferson County, Mo., or elsewhere if the parties consent, which court, if the parties are unable to agree re-

specting compensation, shall have power, subject to the right of appeal, to fix the fair and just compensation for such use and the terms and conditions under which the same may be enjoyed, further subject to the foregoing conditions and limitations.

Section 27 provides that in the event of a change, by any one or more of the constitutent carriers, in the long-existing practice of absorbing switching charges on competitive traffic and of applying equal rates to freight substations and main freight stations of the various carriers, then, [fol. 106] upon demand by the city, respondent shall convey to such carrier or carriers, for a nominal consideration and during the period it or they shall continue to be a constituent or constituents, the right to use for freight purposes for all such tracks as respondent owns or has the right to use, or shall in future own or have the right to use, to the full extent of such ownership or right, in such manner as to make the said freight tracks parts of the railroad of such constituent carrier or carriers to the same extent as though owned by it or them, and of any other carriers admitted to use the same, as tenants in common. It is further provided that upon such conveyance the grantee or grantees shall exercise their rights in common with each other and with respondent, and with any other company or companies thereafter admitted, and shall use the tracks as parts of their respective railroads, consistently with one another's use, as though each of the tracks constituted as to each such carrier an extension of its own tracks, and said tracks shall be in all respects and for all purposes, as between the city and any person, firm, or corporation shipping to or from the city, a part of the railroad of such carrier. Any carrier to which such conveyance shall be made which shall fail to accept the same and to take and operate the tracks as stipulated, or any carrier which shall cease to be a constituent, shall forfeit the right to use, and shall not be permitted to use, the union station or terminal or other facilities of respondent, or to enter upon any of the tracks or cross any of the streets or highways covered by the grant in said ordinance, or have the benefit of any of respondent's property. If, also, upon the happening of the contingency, respondent shall fail or refuse to make such conveyance within 90 days after notice from the city, it shall forfeit all its rights under the grant. Upon a restoration, after the contingency happens, of switching

absorptions by any such carrier and of equality of rates as between its main freight station and the freight substations, such conveyance may, after the lapse of one year, be canceled and the former status restored. Respondent's power to grant to any carrier the right to use the union station, tracks, and terminals "is limited so that such grant shall not authorize the grantee herein to violate any of the terms of the ordinance." Before any constituent company, or any other company under contract with respondent, shall be permitted to enter upon or have the right to use the union station, tracks, terminals, or other property it shall file with the city its written acceptance in the form prescribed in section 27, agreeing to comply with the provisions of the section.

The operating agreement, to which the franchise ordinance refers as above, is a mutual engagement between [fol. 107] respondent, the proprietary lines, and the trustee first above named. Its provisions cover construction, maintenance, operation, use, and management of the terminals, switching and other services to be rendered the proprietaries, and other appropriate matters. It can be modified in any respect only with the assent of respondent and each proprietary line, and only with the additional assent of the trustee in respect of the provisions governing payments of interest upon and principal of bonds, next mentioned, but provides for a ratable reduction of such payments upon admission of each additional carrier. The provisions with which we are here concerned govern the distribution of expenses among the using lines.

As it stands at present, with 12 signatory lines, including the old company, it provides that one-twelfth of the interest accruing on respondent's outstanding bonds and of the taxes and other governmental charges payable by respondent, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, on the other hand, are accounted for and assessed against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and other lines of the respective zones. For the use of the union station and appurtenances, or zone 6, the latter expenses are apportioned, as to each line, in the ratio which the number of its loco-

motives and cars operated into and out of the station bears to the total number of locomotives and cars so operated by all the lines. In that accounting each locomotive is counted as two cars, the locomotive and cars in each train beginning or ending a journey at the station are counted once, and the locomotive and cars of each through train are counted twice, once upon entering and again upon leaving the station. Maintenance and operating expenses of the remaining zones are apportioned, by zones used, in the ratios which the mileage uses per car of the respective zones by the locomotives and cars of the individual carrier bear to the total mileage uses of the same zones made by all locomotives and cars, including those handled and operated by respondent, each locomotive being counted as two cars. The like expenses of respondent's freight stations and substations are divided in the proportions of the tonnage of the lines respectively served. Switching services are performed by respondent at tariff rates, and special services which it may render, such as care of equipment and the like, as well as such supplies as it may furnish, are made the subjects of special charges against the recipient lines, approximately at cost. Revenues derived by respondent from union station concessions or from other uses of the terminal facilities or property, or from switching [fol. 108] operations, after deductions of allocated expenses and charges, are credited monthly to the carriers not in default and in the respective proportions of their contributions as above.

Related provisions are that, while no termination or suspension of any rights of any constituent carrier shall limit or affect its obligation to make the payments provided for, which obligation is absolute and unconditional, without deduction for set-off or counter-claim or other excuse, during the full term of 200 years, yet if any such carrier shall default in payment of interest or principal the amount shall be apportioned equally among and paid by the carriers not in default, upon demand by respondent, or, if it be in default, by the trustee. If any such default in payment or in compliance with any other covenant or condition under the agreement shall continue for a period of 30 days after written demand by respondent for payment or compliance, respondent may elect to exclude the defaulting carrier from the use of the terminal facilities by giving written notice

of such election, without, however, releasing the carrier, but subject to the right of review of contested items; except that for a default in payment of interest or principal the exclusion shall, upon written request of any proprietary carrier not in default, be absolute. Provision is made for reinstatement of defaulting lines upon payment of arrears. Except when and to the extent required by law, respondent may not grant to any other railway company the right to use the terminal facilities unless at least two-thirds of the proprietary carriers not in default assent thereto in writing. By its concluding article the operating agreement is transferred and assigned to the trustee under respondent's first mortgage as further security for the bonds.

By way of support of the contention that the method of apportioning interest charges and taxes provided by the operating agreement is unjust and inequitable, tabulated comparisons of amounts paid by the several lines in accordance therewith and of amounts that would be payable if those charges were distributed on a user basis are exhibited of record. The comparisons are made on several bases, differing primarily in the relative proportions of use which are computed, depending upon the methods employed and their application to separate or aggregate zones, and differing accordingly in results. No particular purpose would be served by considering them in turn, as the conclusions reached make it unnecessary to determine which, if any, embodies an accurate or acceptable formula for division of the charges in question upon a user basis. Merely to illustrate the asserted differences between such charges apportioned in accordance with the operating agreement and again on a user basis the figures in the subjoined table are [fol. 109] excerpted from the first exhibit introduced in the case, stating accrued interest on all obligations, taxes, and special assessments, less profits from terminal operations, for the period from March 1, 1920, to December 31, 1923, and purporting to reapportion them in accordance with relative percentage uses of the entire terminal facility for that period:

Carriers	Percentages of use	Payments on user basis	Percentages assessed	Net actual payments	Increase or decrease on user basis
Santa Fe.....	26.96	$2,302,878.85	8.57	$732,379.63	[1] $1,570,499.22
Alton.....	6.50	555,219.30	8.33	711,830.71	[2] 156,611.41
Burlington....	10.03	856,746.10	8.37	714,905.01	[1] 141,841.09
Great Western.	1.91	163,149.05	8.23	703,407.37	[2] 540,258.32
Milwaukee....	2.89	246,859.04	8.25	704,450.10	[2] 457,591.06
Rock Island...	14.98	1,279,566.95	8.45	721,458.53	[1] 558,108.42
Kansas City Southern....	2.43	207,566.60	8.24	703,474.66	[2] 495,908.06
Petitioner.....	4.28	365,590.56	8.27	706,069.47	[2] 340,478.91
Missouri Pacific	15.57	1,329,963.78	8.45	721,749.65	[1] 608,214.13
Frisco.....	4.87	415,987.39	8.27	706,856.87	[2] 290,869.48
Union Pacific..	5.45	465,530.03	8.30	708,713.88	[2] 243,183.85
Wabash.....	4.13	352,777.80	8.27	706,539.57	[2] 353,761.77

[1] Increase.
[2] Decrease.

While the operating agreement provides for the assumption by each proprietary line of one-twelfth, or 8.33⅓ per cent, of the interest accruing on respondent's bonds, it appears that an issue of short-term notes was, upon the insistence of the small users, apportioned on a user basis, which would seem to account for the above slightly unequal percentage assessments and net payments actually made. Out of a total bond issue of $50,000,000 it appears that approximately $33,000,000 is outstanding in the hands of purchasers, and that approximately $17,000,000 is pledged as collateral to secure certain note issues. Whether the foregoing table may or may not fairly approximate the relative uses of the terminal facilities upon a proper method of determination, it is asserted on one side and not disputed on the other that a redistribution of the charges in question upon a user basis would materially reduce the assessments against some of the lines and materially increase them against others. The so-called large and small users bear correspondingly larger and smaller proportions of the considerable maintenance and operating expenses.

It would seem to be an admissible, although not conclusive, inference from the record that but for the greatly increased cost of the terminals over the original estimates the present controversy would not have arisen. No charge of bad faith or negligence is made, but some of the smaller users assert or imply that had the ultimate cost been foreseen they would not have joined in the project. It is pointed out that, as against a contemplated outlay in the neighborhood of $25,000,000 when the operating agreement [fol. 110] was signed and the project was definitely

launched, the ultimate cost practically doubled that figure and thus magnified the burden which, shared equally by large and small beneficiaries, has fallen upon the latter, with much still remaining to be done to complete the facilities to accord with provisions of the operating agreement and with the plans. The various estimates submitted from time to time are set out in the record with explanations of the increases, such as advanced prices of realty in the course of the prolonged negotiations, changes in the terminal plans, ultimate reduction of the grade of zone 5 from 1.5 per cent to 0.9 per cent, heavy burdens imposed by the city by way of costly viaducts and other grade separations, etc. Respondent and the interveners opposing the relief sought point out that at all times the small users have been in the majority on respondent's board of directors and therefore in position to control the adoption of plans and consequent expenditures. While the Great Western appears to have been invited to join in the project, the Kansas City Southern early and peremptorily demanded admission.

The negotiations of and among the proprietary lines and the advantages and disadvantages accruing to some of the smaller and some of the larger users, particularly in respect of the location of the union station, are dwelt upon at some length. It was first proposed to use the so-called packers' site, immediately north of the present north-end freight line and a short distance east of the Hannibal bridge. This plan fell through because the owners of the site demanded an exorbitant price. Had the station been located on that site, it is pointed out, the lines entering the city from the north would have made smaller uses of the terminal zones, with corresponding reductions in their assessments for maintenance and operating expenses, whereas the petitioner, for example, reaching the present station by a short haul over terminal tracks, would have been obliged to use the materially longer west-bluffs line and other intervening zones to reach a station on the packers' site. Particularly for the Santa Fe, the largest user, emphasis is laid upon the circumstance that it, the Milwaukee, and the Frisco, controlling and using the Kansas City Belt Railway, turned it over at a book value of $143.27 per share of capital stock, and thus contributed to the new project, at a nominal price of $3,500,000, a property claimed to be worth $9,000,000, made available to all the constituent lines and largely in consideration of the agreement by all to share

equally in interest and tax accruals. The Santa Fe also points out, as matters of which it might justly complain, that a low-level freight line on the north side, which would relieve its eastbound freight trains of the ascending grade of zone 5, requiring helper service, and terminal facilities for the care of its equipment, all contemplated by the oper- [fol. 111] ating agreement, have never been provided because of lack of funds. Many other incidents of and following the negotiations are embraced in the record, to review which would merely extend this report.

The grave concern with which the interested parties regard the present proceeding is evidenced by the fact that, among other witnesses, the presidents of eight of the interveners, the operating vice president of another, one of the receivers of the Alton, the operating vice president of the petitioner, and several of respondent's officials appeared and testified, for or in opposition to the relief sought, as their respective interests appeared. Petitioner's witness testified at length and introduced a number of exhibits. His evidence embraces in detail the uses of different zones by different lines, petitioner's contributions for interest and taxes under the operating agreement and upon user bases computed by different methods, a detailed estimate of the reduced cost of separately maintaining its own terminals upon its own property at Kansas City, and various incidental matters. The relief sought contemplates contributions on a user basis in respect of all items and as allocated to the particular zones to be used, without regard to relative uses of the terminals taken as a whole.

Of the interveners seeking relief, the Alton and Kansas City Southern press with particular vigor for a revision of the contract basis of dividing interest and taxes. The witness for the Alton denounced the operating agreement as the most disastrous contract into which that line had ever entered, and expressed his intention, in the event of a reorganization growing out of the pending receivership, of recommending to the court that it authorize a rejection of the agreement. While the Alton and other small-user interveners prefer to remain in the terminals if more favorable terms can be obtained, the witness believes that, if necessary, the Alton can withdraw therefrom and establish terminals on its own property with profit, notwithstanding probable losses of passenger business. The Kansas City Southern also urges that as to it a revision of the contract

terms is imperative, and its evidence is designed to show the severity of the burden imposed upon it by the operating agreement. Others of the small users consider the present terms inequitable and urge a division of the charges upon a user basis. Various other terminals are cited, in which similar charges are divided equally or on user bases. While the Union Pacific intervened in opposition here, it would favor an equitable revision by mutual consent of the parties in interest. Certain of the witnesses recount unavailing efforts to secure such a revision. The proposals [fol. 112] ranged from a distribution of interest and taxes wholly upon a user basis to an equal distribution of the interest upon $25,000,000 of the bonds, a figure approximating the originally estimated cost of the terminals, or upon the $33,000,000 of bonds in the hands of purchasers, the remainder to be apportioned according to use. The proposals are said to have failed through the opposition of the Santa Fe.

No less earnestly respondent and the opposing interveners protest against the proposed disruption of the contract basis of apportionment. It is insisted that such a step, if within our power to enforce, would have calamitous consequences, not only as to the terminal in question but also as to other projects of the kind, into which no carrier could enter and in which no capital could be invested with any faith in its future integrity. Added strength to these considerations is deemed to be found in the fact that in this instance the operating agreement has been assigned as further security for respondent's first-mortgage bonds. It is emphasized that the foundation security, the credit of the component lines, which makes terminal bonds attractive to investors, would be jeopardized or destroyed if once such readjustments were feared to be possible. Several investment bankers and the president of the trustee first hereinbefore mentioned, called as witnesses, strongly support the latter views.

With the foregoing summary we may turn to a consideration of the relief sought and of the contentions in support of and in opposition to that relief. It will be convenient to take up first the case of the intervening small users. Section 3 (4) of the act, relied upon in part by certain of them, and wholly by petitioner, as authorizing a grant of per-

manent relief of the kinds and upon the terms hereinbefore indicated, provides as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or to other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to re- [fol. 113] cover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

This paragraph was added to section 3 by the transportation act, 1920, and superseded a limitation upon the requirement of the section that all common carriers subject to the act, afford all possible facilities for interchange of traffic between their lines, and for receiving, forwarding, and delivering passengers and property, without discrimination, that this should "not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Controverting respondent's challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement. The contention is not, however, founded upon an analysis of the

above-quoted paragraph; nor is any other provision pointed out as in terms conferring upon us any such power to revise a voluntary contract between carriers for the financial support of a joint terminal, not itself in violation of any provision of the act, as we are expressly given by section 15 (6) to revise divisions of joint rates, subjects of prior agreements between carriers, considered and sustained in New England Divisions Case, 261 U. S. 184. The contention rests in part upon judicial decisions recognizing the paramount authority of Congress in the regulation of interstate and foreign commerce, and in certain of them upholding direct exertions of its supreme authority or exercises of the authority committed to us as against existing contracts or conflicting exercises of a State's police power. Cited cases include Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, in which a contract, valid when made, whereby the carrier had obligated itself to provide two passengers injured on its railroad with annual passes for the remainder of their lives, was held to have been subject to an exertion by Congress at any time of its power to regulate interstate commerce and to have been invalidated by the act; Los Angeles Switching Case, 234 U. S. 294, which sustained an order by us requiring the carriers to cease and desist from exacting certain special charges for switching in interstate commerce, although, among other things, the shippers had theretofore consented to the exaction of the charges in consideration of performance of the service; and New York v. United States, 257 U. S. 591, in which was sustained an order by us which required, for removal of undue prejudice and preference, increases in intrastate fares and charges not only held by action of the State authority but in part fixed by an outstanding charter contract with one of the affected carriers. Another is Wisconsin R. R. Commission v. C., B. & Q. R. R. Co., 257 U. S. 563, which sus- [fol. 114] tained a like order as to intrastate fares held by State authority, and still others upheld various phases of the plenary regulatory power of Congress. It should be observed that in cases in which action on our part was considered and upheld, it was action pursuant to definite grants of authority.

The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of

fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto. Other considerations enter into a contract which is impressed with a public interest, whether a contract between carriers or between them and a State or municipality, the provisions of which encroach upon the latent or exerted authority of Congress under the commerce clause of the Constitution. The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that franchise grants are among the mutual covenants make it immune, as was settled in New York v. United States, supra, where in the interest of interstate commerce we had exercised a supervening authority expressly granted to us. In the present act the matter of regulation has been extended to embrace not only rates and practices of carriers subject thereto but also construction and abandonment of railroads, use of terminals, and many other subjects. It is of interest, in passing, that the franchise ordinance, upon which the operating agreement is in part founded, not only purports to prescribe terms governing the enjoyment of the Kansas City terminals by present and future users, but also the matter of switching absorptions and the application of line-haul rates to and from terminal points. Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us.

The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The re- [fol. 115] quirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for

the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

Certain of the interveners cite the provision of section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient

and uneconomical operation of their railways, to cause misapplication by them of funds created for an entirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. [fol. 116] However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation

for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

[fol. 117] An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions.

A prefatory explanation of petitioner's status in the case is necessary to a consideration of its prayer for relief. The incidents leading up to and embraced in the reorganization proceedings through which the petitioner came into existence were many, but for present purposes the ensuing statement will suffice. Following a receivership, the properties of the predecessor old company were sold under foreclosure pursuant to a decree entered by the United States District Court for the Eastern District of Missouri, Eastern Division, in a suit in which respondent and others had intervened. The court declined to grant the prayer of those interveners that the final decree, when entered, should provide that upon sale of the properties the purchaser should take them subject to the operating agreement, and, on the contrary, provided by the decree that the purchaser might, within a year from date of delivery of deeds and taking possession of the properties, elect to adopt or reject any executory contract to which the old company was a

party; no mere conduct or user of rights within that period to conclude the purchaser in respect of such election. Upon appeal, Kansas City Terminal Ry. Co. v. Central Union Trust Company, 294 Fed. 32, the Circuit Court of Appeals for the Eighth Circuit sustained the court below, saying in part:

We * * * conclude that these contracts [original and supplemental operating agreements] are only of the nature of personal promises, and that they are not covenants running with and binding the properties in the hands of whomsoever they may come. * * * They are, it is true, contracts of the old company, * * * but they do not follow the property, and are not binding upon the purchasers, upon a foreclosure sale.

A petition for certiorari, upon which a further appellate review was sought, was denied by the Supreme Court of the United States. 264 U. S. 588. The cause having been remanded and in due course the properties having been sold, the district court entered a decree confirming the sale and directing delivery of deeds by the master, with the right in the purchaser to adopt or reject the operating agreement. [fol. 118] Within the time limited petitioner duly filed its election not to adopt the agreement. Respondent and others have prosecuted a further appeal, and have assigned as error the confirmation of the sale without requiring as a condition thereof that the purchaser assume the operating agreement. The Circuit Court of Appeals, in which the further appeal is still pending, has certified to the Supreme Court of the United States certain questions upon which it desires the instruction of that court, and a final determination may not be had for some time.

In pressing for the desired relief, petitioner contends that the question of its relation to the operating agreement is res adjudicata, while respondent contends to the contrary in the light of the pending further appeal. Petitioner's response that the appeal raises only questions of the fairness of the offer by the purchaser, as to creditors of the old company, is in turn countered by the contention that the matter of adopting or rejecting the agreement entered into the fairness of the offer as to respondent as an unsecured creditor. At all events, the question appears to be squarely raised on the further appeal. It is clear that

we should not undertake to usurp the office of the court and pass upon the merits of that appeal or upon the finality of the foreclosure decree in the particular thus controverted. The questions are before the same appellate court in the same cause, and the final determination can not well be anticipated. Except that meanwhile the petitioner will have had the temporary protection of our service order, a reversal of the court's former conclusion would appear to leave petitioner in the position of the intervening small users, before considered. However, the case has been heard and fully briefed, and the merits will be considered upon an assumption for the moment that petitioner is not bound by the operating agreement.

Respondent contends that petitioner, heretofore and now a terminal user in fact, is not "another carrier" within the purview of section 3 (4), and has been and is "entitled to" the use of the terminals at any time merely by adopting the operating agreement and accepting the pertinent provisions of the franchise ordinance, beyond the power of the other parties to deny. Assuming that the courts shall finally uphold the decree before mentioned, however, the contention recognizes that petitioner is not unqualifiedly so entitled, but only upon condition that it make certain concessions which are of the substance of this controversy. The present use is a provisional arrangement, covered by the service order, pending final determination of the controversy, and not by any arrangement with respondent or directly or indirectly by virtue of the franchise ordinance or the operating agreement. In its present position peti- [fol. 119] tioner is no more "entitled to" the use of the terminals. within the intent and meaning of the act, than any line would be at any terminal with which a satisfactory agreement as to terms could not be reached. It is for just such situations that the act was designed to provide a remedy.

Approaching the issue from another angle, respondent interprets section 3 (4) as requiring, not merely that we find petitioner's "use" of the terminals to be in the public interest, but that he must find it to be in the public interest that we should exercise the extraordinary powers conferred by the provision. Otherwise stating the interpretation, a public interest demanding that we "require the use" rather than one demanding the "use" is the condi-

tion precedent; and respondent urges that no such interest demands the requirement in this case, inasmuch as the desired use is available upon acceptance of the ordinance and agreement. Granting that it is primarily to obtain a requiring order that resort to the provision is had, it manifestly is the "use" which is the direct object and purpose of such a requirement with which the public interest is concerned. Petitioner, deeming the contract terms to be inequitable and excessive, has availed itself of its right to invoke our aid under the provision; and to concede respondent's conclusion here would mean that we should deny the benefits of the provision in every case in which the use would be available on some terms, regardless of any question of their acceptability.

It also is contended that to admit petitioner to the terminals upon terms other than those provided by the operating agreement and applicable to the proprietary lines would constitute an undue preference of petitioner and undue prejudice to the proprietaries or an unlawful discrimination against the latter. This apparently assumes, what ultimately might be found to be or not to be the fact (and what respondent believes would not be the fact), that the terms to be accorded would be more favorable than the contract terms. Be that as it may, what would be true of a single owner of the terminals would be true of virtually joint owners, including a subsidiary terminal company, and as between the mutual terms upon which the proprietary joint use is had and other terms accorded an outside line, as distinguished from discriminating terms accorded two or more outside lines, there would be no ground for a predication of undue prejudice and preference or unjust discrimination within the meaning of the act. See Louisville & Nashville R. R. v. United States, 242 U. S. 60.

One of the opposing interveners points out that the decree of the court merely authorizes petitioner's avoidance of the obligations of the operating agreement, and includes no determination respecting the validity or effect [fol. 120] of the franchise ordinance. It is understood, of course, that the court did not undertake to define the obligations which petitioner must or need not assume if it should desire to reenter the terminals, either in respect of the franchise ordinance or of the operating agreement.

Its decree, as it stands, merely relieves petitioner of a compulsory assumption of the status of a party to the agreement. The question now arises upon this record, whether petitioner's future use and enjoyment of the terminal facilities, if had, are unavoidably conditioned upon its acceptance and observance of the provisions of the ordinance and the agreement, or whether we may accord it as a tenant a right of user upon other terms. For answer, we refer to our foregoing discussion of the force and effect of such contract or franchise provisions as encroach, and to the extent that they encroach, upon the regulatory power of Congress, and repeat that Congress has now made the matter of terminal use, and of the terms and conditions of use, a specific subject of regulation in the manner provided by the act.

The objection raised in the plea to our jurisdiction and in the motion to dismiss that sections 1 (15) and 3 (4) apply to trunk-line railroads only and do not comprehend the facilities of a terminal company, has not been discussed on briefs or orally and may have been abandoned. In any event, it is difficult to conceive upon what reasoning the objection could be supported. Certainly, respondent is a carrier owning or entitled to the enjoyment of the terminals in question, and it and each of the proprietary lines is a common carrier subject to the act. While the provision of section 3 (4) relating to "main-line track or tracks for a reasonable distance outside" a terminal might possibly suggest that in framing it Congress had in mind, as the more common situation, trunk lines as terminal owners, yet Congress could hardly have been unaware of the practice of creating and operating joint terminals through subsidiary terminal companies. At least, the provision is not limited to trunk-line terminals; nor is the authorized relief limited in any case to a terminal use in connection with an outside main-line use, which latter a petitioner might not desire or be in position to make.

At this stage of the proceeding it is unnecessary to consider any question concerning the practical application of the provision of section 3 (4) that compensation to be paid by an outside line for a prescribed use of a terminal, if not agreed upon by the parties and if left for determination by us, is "to be ascertained on the principle controlling compensation in condemnation proceedings." We therefore

pass for the present a contention that a right to use the terminals may not lawfully be accorded petitioner upon compensation determinable upon the user basis desired by [fol. 121] it, but only in pursuance of principles of determination laid down in authorities cited. The section provides for an order requiring the use on such terms and for such compensation as the carriers affected may agree upon, subject to further recourse to us in the event the carriers fail to agree. If such an order shall be entered in this case and the parties shall thereupon be unable to agree respecting terms and compensation the appropriate measure can be determined by us if and when the case is reopened upon that question.

On original briefs and on exceptions respondent and the allied interveners insist that the terminal facilities constitute a unified and integral whole, not divisible or separable for the purposes of this proceeding, the use of no part of which can be separately condemned, and that section 3 (4) does not authorize such acquisition of a right to use portions of the facilities separate and apart from the unified whole. To this view as a matter of law we are unable to accede. Seeking only a right to a physical use as a tenant—a use embracing only such portion of the terminals as would be necessary in the conduct of its business—petitioner's interest in and relations to the terminal facilities would be unlike those of the proprietary lines. In our judgment section 3 (4) does not contemplate and should not receive such a restricted interpretation as would virtually defeat its practical aim and purpose where extensive terminals are concerned. The provisions should have a practical and workable application to practical situations. As a tenant line, seeking a right of user by condemnation for the purposes of a practicably separable physical use, there would appear to be no just ground upon which petitioner should, as a condition to any relief, be required to acquire and pay for a right to make use of portions of the terminals which it would not desire or need and upon which it would impose no additional burdens. The actual uses of different portions made by the different proprietary lines, and such separate physical use as has been and is now made by petitioner, disclosed by the record, indicate that the integrity of the terminals otherwise would suffer no impairment by the appropriated use; but in so

far as the contrary might appear it could and should, of course, be taken into account by appropriate allowance in the adjustment of compensation.

While it also is insisted that the act makes no provision for compensation for a condemned user in annual payments, as the petition seems to contemplate, it may be doubted that a real question in that behalf would arise. A use so taken and enjoyed from year to year, always subject to the possibility of a fortuitous interruption beyond the control of either party, present an aspect somewhat different from the usual expropriation of physical prop- [fol. 122] erty, which ordinarily becomes at once a completed transaction; but, aside from this, inasmuch as adequate security is provided by the act as an alternative to immediate payment, no serious difficulty should be encountered.

An incidental contention that the personal services which respondent renders the proprietary lines pursuant to the operating agreement can not in any case be made the subjects of condemnation does not appear to require consideration. It appears that special charges are made for such services rendered any line, and, so far as services of that character would be concerned, the matter should be left to negotiation between the parties. Switching services, of course, other than switching of passenger equipment to and from the union station, are offered without distinction at tariff rates.

A contention by the Rock Island, that we have no power to require, in effect, that intervener to increase its property investment in the respondent terminal company, of which it is already a proprietary, is faulty in its premise. If the before-mentioned decree shall be ultimately upheld, the increased burden or investment imposed upon each of the remaining proprietaries will have resulted from the provisions of the operating agreement, not from any order which we are asked by petitioner to enter.

We think that the objections to the service order set up in the plea and motion, reiterated on exceptions, are not well taken. What in our opinion was an emergency requiring immediate action existed in the situation, brought to our attention by the petition, in which petitioner appeared to be faced with the alternatives of submission to the franchise ordinance and operating agreement, notwithstand-

ing section 3 (4), or of exclusion from the terminals and consequent interference with its transportation service. The order prescribes for the time being petitioner's use of the terminals in accordance with the terms and provisions of the operating agreement and for the compensation therein provided, and reserves the question of ultimate compensation for the effective period of the order to future agreement between the parties, or, failing agreement, to determination by us. If left to us there will be opportunity to establish by competent evidence what the compensation should be. In either event respondent's interests are safeguarded, and a revisory judicial ascertainment will not be foreclosed. Dayton-Goose Creek Ry. v. United State, 263 U. S. 456, 485-6.

That the petitioner's future use of the terminal facilities, in furtherance of its transportation service, would be in the public interest and practicable, without substantially impairing respondent's ability to handle its own business, is adequately demonstrated by practical experience; and upon all the facts of record we find it so to be. Upon final determination of the cause pending in the courts, before [fol. 123] mentioned, respondent or petitioner, as the case may be, may appropriately certify the result to us. If the courts shall reverse their conclusion and hold petitioner bound by the operating agreement, respondent may move for a dismissal of the petition. On the other hand, if petitioner is finally adjudged not to be so bound, it may move for the entry of an order according it a right of user of the specified zones, upon such terms and for such compensation as the parties may then agree upon. If they are unable so to agree, we may be petitioned to reopen the proceeding for further hearing looking to a determination and prescription of terms and compensation in accordance with the provisions of the act, subject to payment or security therefor as provided. Jurisdiction will be retained accordingly.

Chairman Aitchison concurs in the results.

Commissioner McChord dissents in so far as relief is not accorded the small-user interveners.

Eastman, Commissioner, dissenting:

The present terminal arrangement in Kansas City has for a long time been a cause of bitterness and dissension.

It is also in sharp conflict with the public interest. The majority have done little to help matters. They not only fail to condemn but approve a principle which, if applied generally to the joint use of terminal facilities in the large cities of the country, would be disastrous. Because they are of such far-reaching public importance, I shall discuss at length certain of the questions which are raised by this case.

The Kansas City Terminal Railway Company is a common carrier whose chief function it is to provide other railroads with terminal facilities in Kansas City. It was created for ths purpose and, as is usual in such cases, it stock is owned, with the single exception which is explained in the majority report, in equal shares by the railroad companies which use its facilities. This stock interest is altogether insignificant in comparison wth the total cost of the property, beng in the ratio of about 1 to 50. Twelve different railroad companies now use these terminal facilities. Some of these companies are big and some are little; some are rich and some are poor; the use which they make differs widely in extent. Nevertheless the terms upon which the right to use has been granted require that they all shall pay equal shares of respondent's very heavy interest and tax charges. Operating expenses are divided in proportion to use, but not so fixed charges. The result is that some of the companies which are small users of the terminal facilities suffer a burden which is altogether disproportionate to the benefits accruing from the use, a burden which weighs upon them very heavily indeed. Two of these small [fol. 124] users are in receivers' hands, one is just emerging from receivership, and a fourth is a conspicuously weak company. Such disproportionate and heavy burdens upon roads of this character are necessarily reflected upon the public served. They are plainly a matter not of private interest alone, but of vital public concern.

The disproportionate burdens suffered by the smaller users may be illustrated by the fact that in 1923 the Chicago Great Western's share of the operating expenses, which were divided on the user basis, amounted to $40,324 and the Santa Fe's share to $671,849, whereas both companies paid a share of the fixed charges, which were equally divided among the users, amounting to $226,575. Many other illustrations might easily be given of the unequal way in which the total cost of furnishing these terminal facili-

ties is distributed, with the result that the payments made are altogether out of line with the benefits received; but the fact is patent and conceded.

If support were needed for the conclusion that the present arrangement burdens the small users disproportionately and unjustly, there is abundant evidence to furnish such support. It appears, for example, that there has been dissatisfaction with the arrangement and continual attempts to reform it ever since it became evident that the terminal would cost far more than had originally been estimated. Certain of the large users, as well as the small users, have joined in these attempts at reformation. The most recent attempt very nearly succeeded, only one road, the Santa Fe, standing out against its consummation. In the case of a certain issue of short-term notes it has been agreed by all, including the Santa Fe, and notwithstanding the contract, that the interest charges shall be apportioned upon the user basis. The contract itself has from the beginning provided that if a railroad wishes to use and is permitted to use a certain part of the terminal exclusively, it shall pay not only all the operating expenses but all the fixed charges allocated to that part. This is recognition that it is fair to apply the user basis to fixed charges, at least when the use amounts to 100 per cent.

The inequity of the arrangement is likewise attested by the fact that the user basis has so frequently been applied in similar situations throughout the country, not only to operating expenses, but also to fixed charges. The small users, indeed, assert that the Kansas City terminal is the only large union terminal of great cost in the United States which assesses interest on the numerical rather than on the user basis. This, perhaps, is an overstatement, but it is not far from the fact. The record shows that the user basis is applied, in one form or another, to fixed charges as [fol. 125] well as operating expenses of joint terminals in New York, N. Y., Chicago, Ill., Boston, Mass., St. Louis, Mo., Detroit, Mich., Cleveland, Ohio, St. Paul, Minn., Atlanta, Ga., Portland, Oreg., Washington, D. C., Memphis, Tenn., Chattanooga, Tenn., Birmingham, Ala., Richmond, Va., not to speak of others of lesser importance. The St. Paul case is of particular interest. There the St. Paul Union Depot Company is controlled, as in Kansas City, by stockholding tenants. A dispute having arisen as to the method of apportioning expenses and charges, it was re-

ferred to a board of referees and that board reported on September 24, 1923, to the following effect:

That all fixed charges (including interest on funded debt, amortization of discount and bond expense on funded debt, other interest paid on temporary loans for capital purposes, dividends payable), railway tax accruals, and all operating expenses, dues, and other charges, shall be apportioned upon a user basis.

The recent Cleveland union terminal agreement, which was in effect approved in The Cleveland Passenger Terminal Case, 70 I. C. C. 659, also apportions fixed charges as well as operating expenses on a user basis.

In the case before us two major questions are presented, so far as the small users generally are concerned: First, whether we have jurisdiction in the premises; and second, if we have jurisdiction, whether the facts are such as to warrant action on our part. As a preface to the consideration of the first question, let me state what I believe should be our attitude towards questions of law. This commission is not a court, and a party aggrieved by any affirmative order that we may enter has an opportunity to secure a review of law points in court. The commission was created because the business of the carriers is affected with a public interest, and to guard that interest. This being so, we should resolve doubts against an interpretation of the law which conflicts with the public interest, or, stating the proposition affirmatively, we should resolve doubts in favor of our jurisdiction to right wrongs which injuriously affect the public interest. If we are wrong, the courts will correct us, but at least we shall have given the interpretation which we believe coincides with the public interest a fighting chance for life.

In this case the intervening small users rely particularly upon paragraphs (1) and (3) of section 3 of the interstate commerce act.

Paragraph (1), so far as it has a bearing upon the situation before us, makes it unlawful for any carrier—

to make or give any undue or unreasonable preference or advantage to any particular company * * * corporation or locality * * * in any respect whatsoever, or to subject any particular * * * company * * * corporation

or locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[fol. 126] Paragraph (3) provides that all carriers—

shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines.

It would be difficult to find broader language than is used in paragraph (1). There is a sweeping prohibition of undue or unreasonable preference and prejudice, with nothing to define or limit those terms. Plainly, doubt surrounds the language used, a doubt that can only be resolved by external evidence, such as decisions of the courts interpreting the words in question or such as other provisions of the act. Much the same may be said of paragraph (3). It prohibits a carrier from discriminating in its "rates, fares, and charges" between connecting lines. What are the "charges" of a carrier, particularly in relation to connecting lines? Certainly, that word does not define itself, and in its interpretation it is again necessary to resort to external evidence.

In Smith v. Interstate Com. Comm., 245 U. S. 33, 45, the Supreme Court said:

"The outlook of the Commission and its powers must be greater than the interest of the railroads or that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided." And they must necessarily be expressed in generalities. A precise specification of the powers might work a limitation and all not enumerated be asserted to be withheld.

In Tap Line Cases, 234 U. S. 1, 29, the court said that the commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or car-

riers." The Chicago Junction Case, 264 U. S. 258, 267, contains this statement:

It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. Pennsylvania Co. v. United States, 236 U. S. 351.

The case cited was a discrimination case under paragraphs (1) and (3) of section 3. In that decision the following very significant statement was made at page 366:

While section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress.

At page 362, speaking of the same matter, the court said:

Section 3 was a part of the original Act, and remains unchanged, but there are certain amendments to the Act which are to be read in connection with section 3 as if they were originally incorporated within the Act.

[fol. 127] I take it that this can mean nothing else than that the meaning of a particular provision of the act may be modified and enlarged by amendments of other provisions or by additions to the act. It must be read "with a view to carrying out all the provisions of the act and to make every part of it effective." The conclusion, as I see it, is that the very broad and sweeping language of paragraphs (1) and (3) of section 3 must now be read in the light of the "new railroad policy" which the Supreme Court says was introduced into the Federal legislation by the transportation act, 1920. As evidence of this new policy let me quote from Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 478:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways opportunity to earn enough to maintain their properties and equipment in such a state of efficiency, that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more com-

pletely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, * * *. To regulate in the sense intended is to foster, protect and control commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

Quoting from the New England Divisions Case, 261 U. S. 184, 189:

The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.

In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 585, the same thought was thus expressed:

The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.

In my judgment, paragraphs (1) and (3) were plainly susceptible, even before the passage of the transportation act, 1920, of a construction which would enable us to deal effectively with the situation presented by this case. But those who hold otherwise must now have in mind the new purpose infused into the act by the legislation of 1920. Court decisions interpreting the broad language of these paragraphs of inherently doubtful significance, rendered when public regulation was directed toward a certain end, are not necessarily controlling when that legislation has been directed as well toward other and different ends. And here there need be no hesitation as to the existence of these [fol. 128] other and different ends, for that fact has been repeatedly proclaimed by the Supreme Court in most positive and striking fashion, as the quotations above given and others which might be given plainly indicate. The lan-

guage of these paragraphs is so general and unrestricted in character that its interpretation must necessarily be influenced by the purposes which the act as a whole is designed to achieve.

In the Dayton-Goose Creek case, as we have seen, it was said that the "new act seeks affirmatively to build up a system of railways prepared to handle promptly all of the interstate traffic of the country." In fixing divisions we may even "take into consideration the financial needs of a weaker road" and give it a division "larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system.' " United States v. Abilene & So. Ry. Co., 265 U. S. 274, 284-5. Here we are confronted by a situation which has a vital bearing on the opportunity of certain weak lines to "earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden." The situation is one where respondent is withholding equal treatment from the railroads which use its facilities. The burden which some bear is altogether out of proportion to the use made and the benefits gained, and some of these small users are seriously hampered by this circumstance in the maintenance of good railway service. In my judgment, the language of paragraph (1) of section (3) is broad enough, particularly when read in the light of the new purpose which now pervades the interstate commerce act, to reach this unjustly discriminatory situation.

In my opinion, also, the same conclusion may be reached as to paragraph (3). Respondent is a carrier and its chief function is to provide other carriers with terminal facilities. In fulfilling that function it clearly performs a public service and the compensation which it exacts for such service is just as clearly affected with a public interest. Compensation might, and in analogous situations sometimes does, take the form of published tariff charges. Here it takes the form of stipulated payments into the treasury of the terminal carrier. It is a reasonable construction, and one which the new purpose of the act may well lead us to accept that these payments are "charges" which respondent exacts within the meaning of paragraph (3). In other words, the "charges" of which that paragraph speaks are all the charges, whatever their nature and form, which

are assessed for the public service or services which a carrier is created to perform.

Does the contract under which the payments for these terminal facilities are made prevent the exercise of our [fol. 129] jurisdiction in the premises? In view of the stress laid in this case upon the sanctity of contracts, it will not be amiss to quote the following from Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 202:

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The powers of government extend to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

The opinion of the majority conveys the thought that the intervening small users are trying to persuade us to revise or rewrite the contract for the use of the terminal facilities. I do not so understand their position. Their contention is that no contract can stand in the way of the exercise in the public interest of our powers under the act; and this doctrine is, indeed, admitted and amply supported by citations in the majority opinion. When we exercise such powers in conflict with the provisions of a contract, we do not undertake to revise or reform that contract. We merely direct that certain things be done. If they can be done under the contract, well and good. If they can not be done under the contract, it must be disregarded. When, for example, we required the establishment of passenger fares at the rate of 3.6 cents per mile over the main line of the New York Central within the State of New York, we did not undertake to revise the contract between the State and the railroad which was a part of the latter's charter and provided for a 2-cent per-mile rate. We merely

required the rate to be 3.6 cents per mile regardless of the contract. Our power in this respect is wholly different from that of a court of equity which undertakes to reform a contract for the benefit of one of the parties to it. We do not seek to enforce the principles of equity but only to administer certain legislative provisions for the protection of the public interest, against which provisions a contract is no bar.

Furthermore, the fact that here the 12 railway companies entered into a contract with respondent which resulted in the discrimination in no way estops them from seeking affirmative relief against this discrimination through the exercise of our powers in the public interest. This was clearly established in the Los Angeles Switching Case, 234 U. S. 294, 312-3, where Justice Hughes said:

It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight [fol. 130] were received and delivered thereon, and that the charge in question had been generally maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. * * * If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carrier to stop the objectionable practice.

It is quite true that if we were concerned with the small users alone we might well leave them to a fate which they apparently invited and embraced, and in all probability we could do nothing else. But our concern is with the public interest from which our jurisdiction springs. No negligence or unwisdom or dereliction upon the part of the small users can justify us in disregarding that public interest by permitting an unjust discrimination to continue which injuriously affects that interest.

Returning to the opinion of the majority, it will be noted that no conclusion is reached that we are without jurisdic-

tion in the premises under paragraphs (1) and (3) of section 3 or that the contract is a bar to the exercise of such jurisdiction. The conclusion, so far as it affects the question that I am now discussing, is quite different. In view of its importance I shall quote this conclusion in full:

Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportion of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

This finding merits analysis, for if I am right it is wrong in every important respect. In the first place, let us consider the statement that the charges in question are "distinctly capital chargees, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make." Reference to the contract will show that the Kansas City Terminal Railway Company is the party of the first part and that the so-called proprietary [fol. 131] lines are the parties of the second part. The mutual covenants of these parties are preceded by the following paragraph:

Whereas, each of the railway companies parties of the second part hereto (hereinafter collectively referred to as the Railway Companies) desires, for purposes of greater

economy and convenience, to avail itself of the services of the Terminal Company and the use of said Union Passenger Station, line of railroad, track, and all other facilities of the Terminal Company; and the Terminal Company is willing to serve the Railway Companies and to grant to the Railway Companies the right to use all the facilities of the Terminal Company upon the terms and conditions hereinafter set forth:

The terminal company, "in consideration of the sums to be paid by the Railway Companies respectively as hereinafter provided," covenants and agrees to build the station and the other facilities and to grant the right to use the same to each of the railway companies upon certain conditions during the term of 200 years. Among the sums which the railway companies covenant to pay to the terminal company in consideration of this right of use are the sums covering interest and tax charges. These sums are "payable to the Terminal Company or pursuant to its written order." They are not distinguishable in purpose or category from the sums which the railway companies covenant to pay covering the expenses of maintenance and operation, and like those latter sums they clearly form part of the consideration for the right to use the terminal facilities. Further evidence of this fact is afforded by the provision that in case of default by any of the railway companies in the payment of any sum due under the contract, including the sums covering interest and tax charges, the penalty for such default is exclusion from the use of the terminal facilities. It will thus be seen that the statement in the finding quoted above is incomplete and misleading, that "for their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions." The payments on account of maintenance and operating expenses form part of the consideration paid for the right to use the terminal facilities, but only a part, the remainder consisting of the payments on account of interest and tax charges.

The finding continues with the thought, as I understand it, that the payments on account of interest and tax charges are not unduly prejudicial or preferential or unjustly discriminatory, because "each proprietary pays an equal share of the aggregate interest and taxes upon its equal share

in the aggregate property." This is a complete non sequitur. It confuses the status of the railway companies as stockholders of the terminal company with their status as users of its terminal facilities. Stockholders are under no obligation to make payments into the treasury of their [fol. 132] company for the purpose of meeting any of its charges or, indeed, to make such payments for any purpose except in return for a quid pro quo. So far as compensation for the right to use the terminal facilities is concerned, the fact that these railway companies hold stock of the terminal company certainly can not make charges just which would be unjust if they had no stock interest. It might as well be argued that a shipper who owns stock in a railroad company can justly and lawfully be required to pay for freight service on a different basis from shippers who either do not own stock at all or do not own as much.

If the majority are right in the thought that the equal shares of the aggregate interest and taxes are justified by the equal shares in the aggregate property, then it would follow that if one of the railway companies happened to own all of the stock of the terminal company it would be just that such railway should pay all of the interest and taxes regardless of the use which it makes of the terminal facilities. Likewise, if one of the railway companies owned 45 per cent of the stock and the remainder were divided among the other 11 railway companies in equal shares of 5 per cent each, it would be fair that these proportions should determine the respective shares of interest and taxes. Moreover, it would seem to follow that if this joint terminal arrangement in Kansas City is not unduly prejudicial or preferential or unjustly discriminatory, then the joint terminal agreements so common in other cities, where fixed charges are apportioned upon a user basis, must be within the condemnation of the law. The record shows that the Santa Fe would pay $379,517 per year more on the user basis than it now pays, while the Chicago Great Western would pay $144,881 less. Methods which result in such discrepancies can not both be right. In most of these other cities the stock of the terminal company is owned by the using lines, just as it is here.

There is only one ground upon which these payments for the use of the terminal facilities, which are so obviously disproportionate to the actual uses made, could conceivably be held to be free from undue prejudice or unjust discrim-

ination. That ground, which is not mentioned by the majority, is that the right to use is equal regardless of the extent to which the railway companies avail themselves of this right. That is to say, there is equality of opportunity. One answer to that is that here the right to use is not in all cases equal, since the terminal property is divided into zones and the right to use is confined to such zones as each company selects for its own particular purposes. A more [fol. 133] important answer is that the right to use can not justly, in actual practice, be separated from the ability to avail of that right. It is perfectly obvious that where the railway companies differ so widely in size and in the physical location and characteristics of their lines entering the city, rights to use the terminal facilities are of wholly unequal importance and value. There is no way in which these differences in importance and value can be accurately measured except by the test of the actual use made. That is demonstrated by the widespread adoption of the user basis in similar situations, and was so found by the board of referees in St. Paul. Indeed, if any other basis should generally be required in agreements for joint use of terminal facilities in large cities, the extension and development of such highly desirable arrangements would probably come to an end.

The majority opinion reflects the thought that fixed charges and taxes incurred in the furnishing of service are not to be regarded as a part of the "cost" of that service and in this respect are to be sharply distinguished from maintenance and operating expenses. In determining the amount which ought to be paid for service there is no valid basis for such a distinction. When a railroad fixes its rates for freight or passenger service, it quite properly attempts to fix them at amounts which will cover not only expenses of operation, but taxes, interest, and a reasonable profit as well. It does not seek to collect its taxes and interest from its stockholders. Neither does it seek to collect from each user of its freight or passenger service an equal share of interest and taxes. All pay in proportion to the service that they receive, i. e., upon the user basis. There is no good reason why a common-carrier terminal company whose public service is the furnishing of terminal facilities to other railway companies should charge for that service upon any different basis.

The principle was well set forth by counsel for the terminal company in St. Louis in a statement which is quoted in United States v. St. Louis Terminal, 224 U. S. 383, 388, as follows:

Every consideration of a public nature points to a consolidation of the terminals and to a common use of them by all the railroad companies coming into the city. But to avoid the odious phases of a monopoly, this use must be open to all upon equal terms. The charge for service in any case can be stated in one word—cost. No money received for the service rendered goes to any other purpose than paying expenses of operation, taxes, fixed charges, and proper maintenance. No dividends are paid upon terminal shares, and no proprietary railroad company is a beneficiary of fixed charges. Any new railroad built into St. Louis now has but to secure a way to a terminal track and it has at once the advantages of the entire terminal system.

As I stated at the outset, this is a matter of great public importance. The railroads of the country have been put under our "fostering guardianship and control" in order [fol. 134] that they may have an "opportunity to earn enough to maintain their properties and equipment in such a state of efficiency" that they can "handle promptly all the interstate traffic of the country." In the furtherance of that desirable end, we may even give a weaker road divisions "larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system." Here the majority find that we may not even go so far as the ends of justice would suggest, and that we must allow burdens which are plainly disproportionate and unreasonable to remain upon the small users, notwithstanding the injurious effect upon the public interest. I can not accept this conclusion. I believe it to be wrong and I am persuaded that we have ample power to deal effectively with the situation.

Summing up the case, the record justifies a finding that the respondent terminal company, under the arrangements now in effect, is giving an undue and unreasonable advantage and preference to the larger users of its terminal facilities, to the undue and unreasonable prejudice and disadvantage of the smaller users, including the petitioner,

contrary to the provisions of paragraph (1) of section 3 of the interstate commerce act, and that it is also unjustly discriminating in its charges as between connecting lines, contrary to the provisions of paragraph (3) of the same section. For the present I would enter no order and go no further than this finding, leaving the companies free to effect, if they can, a voluntary adjustment of the matter.

I am authorized to state that Commissioner Campbell concurs in this dissent.

[fol. 135] Order

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 10th Day of November, A. D. 1925.

No. 15682

Missouri-Kansas-Texas Railroad Company

v.

Kansas City Terminal Railway Company

This case being at issue upon petition, answer, and other pleadings on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the intervening petitions heretofore filed in the above-entitled proceeding by the Chicago & Alton Railroad Company and receivers thereof, Chicago Great Western Railroad Company, Kansas City Southern Railway Company, St. Louis-San Francisco Railway Company, Chicago, Milwaukee & St. Paul Railway Company, and Wabash Railway Company be, and they are hereby, dismissed.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 136] EXHIBIT 6 TO PETITION

Stock Trust Agreement Relating to Stock of Kansas City Terminal Railway Company, dated June 12th, 1909

First Supplemental Stock Trust Agreement, Dated January 24th, 1910, and Instruments Appointing the First National Bank of Kansas City as Successor Trustee Under the Stock Trust Agreement and Supplemental Stock Trust Agreement

[fol. 137] Stock Trust Agreement Between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the first part, and Pioneer Trust Company, of Kansas City, Mo., of the second part, and Kansas City Terminal Railway Company, of the third part

Relating to Stock of the Kansas City Terminal Railway Company

Dated June 12th, 1909.

[fol. 138] Agreement, made this 12th day of June, 1909, between The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation, organized under the laws of the State of Missouri and other States; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a con-

solidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska; Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter referred to as the Railway Companies), parties of the first part, and Pioneer Trust Company, a corporation of the State of Missouri (hereinafter called the Trustee, which expression wherever herein used shall include any successor or successors to such Trustee, in the trust hereby created), party of the second part; and Kansas City Terminal Railway Company, a corporation of the State of Missouri, party of the third part:

Whereas, the Kansas City Terminal Railway Company (hereinafter called the Terminal Company), a corporation organized and existing under and by virtue of the laws of [fol. 139] the State of Missouri, is about to execute to Samuel W. Moore, a citizen of the State of Missouri, and to Illinois Trust and Savings Bank, a corporation of the State of Illinois, as trustees, a certain mortgage or deed of trust to secure an issue of $50,000,000.00 par value of the first mortgage, four per cent. gold bonds of the Terminal Company, which mortgage is to be substantially of the tenor of Exhibit "A" hereto attached; and

Whereas each of the Railway Companies has acquired and owns an equal number of shares, to-wit: one thousand shares, of the capital stock of the Terminal Company and the Railway Companies are about to enter into an agreement with the Terminal Company and the said Illinois Trust and Savings Bank, as Trustee, substantially of the tenor of Exhibit "B" hereto attached, whereby among other things the Terminal Company grants to the Railway Companies the right to use for the term of two hundred years its union passenger station and certain other terminal facilities, as set forth in said Exhibit B, and the Railway Companies covenant and agree to pay the interest on said bonds and all other fixed charges and taxes and the maintenance and operating expenses of the Terminal Company; and each of the Railway Companies as an inducement to the execution by the other Railway Companies of such Exhibit B, and in consideration thereof, and for other valuable considerations, has agreed with the other Railway Companies, and each of them, to execute these presents and to assign and transfer to the Trustee all said shares of the capital

stock of the Terminal Company acquired by such Railway Company (except five shares reserved by each of said railway companies) for the purpose of securing the due and punctual performance of this agreement and of such other agreement Exhibit B.

[fol. 140] Now, therefore, it is mutually agreed by and between the parties hereto as follows:

Article I

Stock of Terminal Co. delivered to Trustee.

Section 1. This agreement shall be executed by the parties in twelve uniform originals; one of which shall be delivered to each of the parties.

Each of the Railway Companies agrees forthwith to deliver to the Trustee the certificates for nine hundred and ninety-five shares of the capital stock of the Terminal Company, such certificate being accompanied, in each case, by instruments of assignment and powers of attorney for the transfer of such shares upon the books of the Terminal Company into the name of the Trustee as hereinafter provided.

The Trustee, forthwith, shall cause the shares represented by the certificates delivered by each of the Railway Companies to be transferred upon the books of the Terminal Company into the name of the Trustee, as trustee for such Company subject to the provisions of this agreement.

Trustee entitled to rights of stockholders.

Each of the Railway Companies hereby sells, assigns and transfers to the Trustee the shares in the Terminal Company represented by said certificates delivered by it to the Trustee; and the Trustee shall have and be entitled to exercise all the rights and powers of a stockholder in respect of the said shares, including the right to collect and receive all dividends that shall be declared upon such shares and the right to vote upon such shares at all meetings of stockholders of the Terminal Company subject to the terms and conditions of this agreement.

All said shares in the Terminal Company shall be held by the Trustee upon trust for the purposes and upon the terms and conditions herein expressed, until delivered, transferred or surrendered as herein provided.

Additional stock of Terminal Co. to be

[fol. 141] Sec. 2. As often as the Terminal Company shall issue additional capital stock, the same shall be offered to the Railway Companies not then in default, in equal

amounts; and they each severally agree to subscribe and pay for the same upon such terms as may be agreed upon, or in default of such agreement, upon such terms as may be fixed and determined by the Terminal Company, to the end that the interest of each Railway Company, not in default, represented by its ownership of capital stock of the Terminal Company may at all times be equal; and any and all stock so subscribed and paid for shall forthwith be delivered and transferred to the Trustee, and all the terms and provisions of this agreement shall apply thereto to the same extent as to the stock now owned by the Railway Companies and transferred to the Trustee under this agreement; provided, that if, at any time hereafter, any railway company, not now a party to Exhibit B and not then a party thereto by succession, as therein provided, shall have acquired any portion of the capital stock and shall have executed (1) an agreement with the Terminal Company substantially in accordance with the terms of Exhibit B, and (2) an agreement with the parties hereto, substantially in accordance with the terms of this contract, such railway company shall be deemed and considered one of the Railway Companies for all the purposes of this section.

taken by Railway Companies.

Provisions of this agreement to apply.

New Companies admitted.

Article II

Section 1. Each of the Railway Companies covenants and agrees to and with each of the other Railway Companies as follows:

Railway Companies agree.

(a) To execute said agreement substantially as set forth in said Exhibit B.

To execute Exhibit B.

[fol. 142] (b) To pay promptly when due every sum that may become payable by it under said agreement Exhibit B, and to perform and comply with all the terms, covenants and provisions of said Exhibit B.

To make payments required by Exhibit B.

(c) From time to time, upon demand of the Trustee, to pay the same proportion of the expenses of the trust hereunder, including the reasonable compensation of the Trustee and all expenses that may be incurred in preserving the pledged stock and of defending and enforcing the rights and interests of the parties hereto in respect of said stock or under this agreement, as it shall be required to contribute to the payment of interest and the principal

To pay expenses of this trust.

of mortgage bonds as provided in said Exhibit B; and also to the same extent, to indemnify the Trustee against all damage and liability while acting hereunder, and also from time to time, upon demand of the Trustee, to pay the taxes, if any, assessed upon the stock by such Railway Company pledged hereunder and then held by the Trustee.

Railway Companies to be reimbursed.

Sec. 2. If any of the Railway Companies shall be required to make any payment under paragraph (c) of Section 1 of this Article on account of the default of any other Railway Company or Railway Companies, then the claim or claims of the Trustee against the Railway Company or Railway Companies in default shall be held and enforced by the Trustee for the Railway Companies that made such payment, and any sum or sums received or collected from such Railway Company or Railway Companies in default shall be applied ratably to reimburse, with interest at the rate of seven per cent per annum, the Railway Companies which made such payments.

Payments made to Trustee.

Sec. 3. Every sum payable by any of the Railway Companies to any other of the Railway Companies under any provision of this instrument shall be payable by depositing [fol. 143] the same with the Trustee to the credit of the Railway Company to which such sum is payable; and upon receipt thereof by the Trustee such sum shall be paid by the Trustee to such Railway Company upon demand.

"Exhibit B" defined.

Sec. 4. Exhibit B as used herein shall be deemed to include the said contract as originally executed and as it may be subsequently amended or modified by the parties to it as therein provided. The expression "the Railway Companies" shall include the Railway Companies and each of them parties to this agreement and any other railway company which shall have acquired any portion of the capital stock of the Terminal Company and shall have become a party to Exhibit B and to this agreement; and also such of the successors of said Railway Companies as shall succeed to the rights and privileges of the said contract Exhibit B and become bound by its obligations; provided that no such successor Railway Company shall have any beneficial interest in the capital stock of the Terminal Company pledged by its predecessor under this agreement until such successor Railway Company shall have become a party to this contract.

"Railway Companies" defined.

Article III

Rate of interest payable on default.

Section 1. In case any one of the Railway Companies parties hereto shall make default in payment of any sum which shall be payable by it under said Exhibit B or under this instrument, then the Railway Company in default shall be liable to pay interest thereon at the rate of seven per cent per annum until such sum shall be fully paid.

Default by any Railway Company.

Sec. 2. In case any one of the Railway Companies parties hereto shall be in default in respect to any payment to be made under said Exhibit B, or under this instrument, or in the performance of any of its covenants or agreements [fol. 144] herein contained, then until such Railway Company shall have paid such sum with interest as aforesaid or shall have complied with such covenant or agreement,

Stock of company in default.

each of the other Railway Companies, not being in default, shall be entitled to vote upon a proportion of the shares transferred by the Railway Company in default to the Trustee, and then held by the Trustee hereunder, at all meetings of the stockholders of the Terminal Company for the election of directors and for all other purposes, which shall be as one to the whole number of the Railway Companies not then in default, and the Trustee shall execute and deliver to each of said Railway Companies not then in default a power of attorney appointment such Railway Company or any person or persons that may be designated by such Railway Company in writing, the attorney, agent and proxy of the Trustee, with powers of substitution, to vote upon such proportion of such shares at all such meetings of the stockholders of the Terminal Company; and

Proxies.

Stock of company excluded, held for joint benefit of companies not in default.

Sec. 3. If any of the Railway Companies, parties hereto, shall be excluded from the use of the Terminal Facilities, as provided in Exhibit B, and particularly in Section 13 of Article III thereof, then the Trustee shall thereafter hold the shares transferred to it by the Railway Company so excluded from the use of the Terminal Facilities, for the joint use and benefit of the other Railway Companies, parties hereto, which may then be entitled under the provisions of Exhibit B to use and enjoy the Terminal Facilities; and each of the Railway Companies hereby agrees with the Trustee, and with each of the other Railway Companies, to release and relinquish to the Trustee all further right,

title or interest in or to its said shares, and that this instrument shall operate as a release and relinquishment thereof, in the event that it shall be excluded from the use of the Terminal Facilities as aforesaid, and consents and requests [fol. 145] that the Trustee shall thereafter hold said shares, under the terms of this instrument, for the joint use and benefit of the other Railway Companies which may then be entitled to use the Terminal Facilities under the terms of Exhibit B; provided, that if any of the Railway Companies, parties hereto, after being excluded from the use of the Terminal Facilities as provided in Exhibit B, and particularly in Section 13 of Article III thereof, shall be reinstated and become entitled to use said Terminal Facilities, as therein provided, the Trustee shall thereafter, and so long as such Railway Company shall be entitled to use the Terminal Facilities under Exhibit B, hold the shares of stock transferred to it by such Railway Company under the terms of this agreement in the same manner and to the same extent as though such Company had never been excluded from the use of the Terminal Facilities.

Railway Company in default may be reinstated.

Article IV

Railway Company not in default entitled to dividends.

Section 1. Each of the Railway Companies, if and so long as it shall not be in default in making payment of any sum by it payable under said Exhibit B, or under this instrument or in the performance of any of the covenants and agreements herein contained, shall be entitled to receive from the Trustee all dividends received or collected by the Trustee upon the shares transferred by such Railway Company to the Trustee and then held by the Trustee hereunder; and the Trustee shall pay over to such Railway Company all such dividends that shall be collected or received by the Trustee upon such shares; but if and so long as any Railway Company shall be in default, as aforesaid, any dividends upon the shares of the Terminal Company, transferred by such defaulting Railway Company to the [fol. 146] Trustee, received by the Trustee during such default, shall be forthwith paid over by the Trustee to the other Railway Companies not then in default, in equal shares.

Dividends of Railway Company in default.

Article V

Section 1. Each of the Railway Companies, if and so long as it shall not be in default in making payment of any sum by it payable under said Exhibit B or under this instrument or in the performance of any of its covenants or agreements herein contained, shall be entitled to vote at all meetings of the stockholders of the Terminal Company for the election of directors and for all other purposes, upon all the shares in the Terminal Company transferred by such Railway Company to the Trustee and then held by the Trustee, upon its proportion of shares transferred to the Trustee by any Company or Companies in default, as provided in Section 2 of Article III hereof, and upon its proportion of shares held by the Trustee for the joint use and benefit of the Railway Companies then entitled to the use and benefit of the Terminal Facilities as provided in Section 3 of Article III hereof; and the Trustee shall from time to time execute and deliver to it a power of attorney appointing such Railway Company or any person or persons that may be designated by such Railway Company in writing, the attorney, agent and proxy of the Trustee, with power of substitution, to vote upon such shares at all meetings of the stockholders of the Terminal Company held within ninety days after the date of such power of attorney; provided, however, that any such power of attorney shall be cancelled and terminated by the execution and delivery by the Trustee of any power of attorney under the provisions of Section 2 of Article III of this agreement, and shall also be terminated as to any Company by the [fol. 147] exclusion of such Company from the use of the Terminal Facilities, as provided in Exhibit B, and particularly in Section 13 of Article III thereof; and such power of attorney shall also be cancelled and terminated, and a new power of attorney shall be issued by the Trustee in favor of any company which, during such period of 90 days, shall make up any default previously existing.

Railway Company not in default entitled to vote stock.

Transferred by it to the Trustee.

Held by Trustee account default or exclusion of other company.

Proxies executed by Trustee.

Proxy may be cancelled.

Article VI

Section 1. This agreement may be terminated at any time by an instrument in writing executed by the Trustee and by each of the Railway Companies parties hereto not then in default; but unless previously so terminated this agreement shall continue in force, so long as Exhibit B

This agreement may be terminated.

shall remain in force. In case of any such termination of this agreement the Trustee shall redeliver and retransfer to each of the Railway Companies not then in default any shares transferred by it to the Trustee and shall also transfer and deliver to each of the Railway Companies not then in default, a proportion of any shares then held by the Trustee for the joint use and benefit of such Railway Companies, under Section 3 of Article III hereof, which shall be as one to the whole number of Railway Companies not then in default, upon payment by such Railway Company of all sums by it payable under said Exhibit B or under this instrument to the Terminal Company or to any of the other Railway Companies or to the Trustee.

Article VII

Purpose of this agreement.

Section 1. The Trustee has become party to these presents only for the purpose of signifying its acceptance of the trusts hereunder; the Terminal Company has become a party to these presents to signify its assent to the provi- [fol. 148] sions of Section 2 of Article 1; it being understood that this agreement is made for the purpose of furnishing to each of said Railway Companies security for the performance by each of the other Railway Companies of its covenants and agreements contained in said Exhibit B and in this instrument; that the provisions of this agreement shall in no manner impair or affect any of the terms, conditions or provisions of said mortgage or deed of trust for the benefit of the trustees thereunder or for the holders of the bonds thereby secured or any of the terms, conditions or provisions of said agreement Exhibit B.

Article VIII

Notices, how given.

Section 1. Any demand, request, notice, designation or selection to be made by the Railway Companies or any of them under any provision hereof shall be sufficiently given and served if signed by the president or a vice-president or by the chairman of the executive committee or by the comptroller or by the secretary or an assistant secretary of the Railway Company in whose behalf the same shall purport to be made and delivered to or served upon any one of such officers of any of the other Railway Companies.

Article IX

Trustee may resign or be removed.

Section 1. The Trustee, or any successor trustee, may resign and be discharged from the trust created by this agreement by giving to each of the Railway Companies notice in writing of such resignation and specifying the date when such resignation shall take effect. Such resignation shall take effect from the date specified in such notice unless previously a successor trustee shall be appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such [fol. 149] successor trustee. The Trustee or any successor trustee may be at any time removed from the trusteeship by a majority of the Railway Companies not then in default by an instrument in writing, duly signed by them or by their attorneys duly authorized. Upon removal the trustee so removed shall be entitled to the payment of its reasonable charges for the services rendered by it and the expenses incurred by it in the management of the trust.

Appointment of successor Trustee.

Sec. 2. In case a vacancy shall exist at any time in the trusteeship hereunder from whatever cause arising, a majority of the Railway Companies not then in default may by written appointment under their respective hands appoint a new trustee, or successor trustee; the new appointment of a trustee, or successor trustee, as herein provided, shall be effectual to vest in such trustee so appointed the appropriate authority, rights, powers and duties herein provided in that behalf; and in every case of resignation by trustee or of removal of a trustee, the trustee so resigning or removed shall at the request of any of the Railway Companies or of the trustee so appointed assign, transfer and deliver to such successor trustee all moneys, shares of stock, rights, contracts, choses in action, evidences of indebtedness and all other matters or things then held by it as such trustee under this agreement.

In witness whereof, each of the parties hereto has caused these presents to be signed by its president or one of its vice-presidents and its corporate seal to be hereunto affixed and attested by its secretary or an assistant secretary the day and year first above written.

[fol. 150] The Atchison, Topeka and Santa Fe Railway Company, By E. P. Ripley, President. (Seal.)

Attest: Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, President. (Seal.)

Attest: Geo. H. Crosby, Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, President. (Seal.)

Attest: F. H. Hamilton, Secretary.

[fol. 151] Union Pacific Railroad Company, by R. S. Lovett, President. (Seal.)

Attest: Alex. Millar, Secretary.

The Chicago and Alton Railroad Company, by T. P. Shonts, President. (Seal.)

Attest: J. Steuart Mackie, Secretary.

The Wabash Railroad Company, by F. A. Delano, President. (Seal.)

Attest: E. B. Pryor, Asst. Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, President. (Seal.)

Attest: C. N. Whitehead, Secretary.

[fol. 152] The Missouri Pacific Railway Company, by C. S. Clarke, Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

Chicago, Burlington and Quincy Railroad Company, by Geo. B. Harris, President. (Seal.)

Attest: H. W. Weiss, Asst. Secretary.

Pioneer Trust Company of Kansas City, Mo., by Walton H. Holmes, President. (Seal.)

Attest: B. H. McGarvey, Secretary.

Kansas City Terminal Railway Company, by Horatio L. Harmon, President. (Seal.)

Attest: C. C. Ripley, Secretary.

[fol. 153] STATE OF MISSOURI,
County of Jackson, ss:

On this 29th day of July, in the year 1909, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its board of directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of October, in the year 1909, before me personally came E. P. Ripley, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is [fol. 154] the president of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by

like order; and said E. P. Ripley acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this first day of November, in the year 1909, before me personally came A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago in the State of Illinois; that he is the president of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name [fol. 155] thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 18th day of December, in the year 1909, before me personally came H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his

name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois. My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 156] STATE OF MISSOURI,
City of St. Louis, ss:

On this 23rd day of December, in the year 1909, before me personally came B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the president of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of December, in the year 1909, before me personally came R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is the president of Union Pacific Railroad Company, one of the corporations described in and which executed [fol. 157] the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its board

of directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Walter H. Smith, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1910. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of November, in the year 1909, before me personally came T. P. Shonts, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is president of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said T. P. Shonts acknowledged said instrument to be the free act and deed of said corporation.

[fol. 158] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Chas. R. Bosse, Notary Public, New York County, N. Y. My commission expires on the 30th day of March, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 18th day of November, in the year 1909, before me personally came F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order;

and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De La Mater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 159] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of January, in the year 1910, before me personally came A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Dallas, in the State of Texas; that he is the president of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Lee W. Hagerman, Notary Public, City of St. Louis, Mo. My commission expires on the 15th day of March, 1912. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of January, in the year 1910, before me personally came C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the vice-president of The Missouri Pacific Railway Com-[fol. 160] pany, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged

said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donovan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of November, in the year 1909, before me personally came George B. Harris, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George B. Harris ac- [fol. 161] knowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the 12th day of March, 1910. (Seal.)

STATE OF MISSOURI,
County of Jackson, ss:

On this 11th day of July, in the year 1910, before me personally came Walton H. Holmes, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Pioneer Trust Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order;

and said Walton H. Holmes acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Lilah M. Lykins, Notary Public, Jackson County, Missouri. My commission expires on the 14th day of July, 1913. (Seal.)

[fol. 162] First Supplemental Stock Trust Agreement Between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the first part, and The Kansas City Southern Railway Company, and Chicago Great Western Railroad Company, of the second part, and Pioneer Trust Company, Trustee Company of Kansas City, Missouri, of the third part, and Kansas City Terminal Railway Company, of the fourth part

Relating to Stock of the Kansas City Terminal Railway Company

Dated January 24th, 1910.

[fol. 163] Agreement, made this twenty-fourth day of January, 1910, between The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific

Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska; Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the "Old Companies"), parties of the first part; The Kansas City Southern Railway Company, a corporation of the State of Missouri, and Chicago Great Western Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the "New Companies"), parties of the second part; and Pioneer Trust Company, a corporation of the State of Missouri (hereinafter called the Trustee, which expression wherever herein used shall include any successor or successors to said Trustee in the trust hereby created), party of the third part; and Kansas City Terminal Railway Company (hereinafter referred to as the "Terminal Company"), a corporation of the State of Missouri, party of the fourth part, witnesseth:

Whereas, the parties of the first, third and fourth parts have heretofore, on the 12th day of June, 1909, entered [fol. 164] into a certain agreement (to which this contract is supplemental), relating to the stock of the Terminal Company, which agreement is hereinafter referred to as the "Stock Trust Agreement"; and

Whereas, the New Companies severally desire to be admitted to the joint use of the Union Passenger Station and all the Terminal Facilities referred to in the Operating Agreement, designated as "Exhibit B" in the Stock Trust Agreement, and to that end have concurrently with the execution of this instrument executed the First Supplemental Operating Agreement, a contract supplemental to said "Exhibit B," and it is now desired by the parties hereto that the New Companies shall severally subscribe to the capital stock of the Terminal Company and deposit such stock with the Trustee under the terms and conditions of the Stock Trust Agreement in the same manner and with like effect as though the New Companies had been parties thereto originally;

Now, Therefore, the parties hereto do mutually covenant and agree each with the other as follows:

First. Each of the New Companies hereby agrees to subscribe for one thousand (1,000) shares of the capital stock of the Terminal Company, each of said shares being in the sum of One Hundred Dollars ($100.00) par value, so that

the aggregate amount par value subscribed by each of the New Companies shall be One Hunderd Thousand Dollars ($100,000.00); and each of the New Companies agrees to pay for said stock in cash at par to the Terminal Company, as and when the same shall be called for by the President of the Terminal Company, together with interest at the rate of five per cent. per annum upon the average amounts paid from time to time by the Old Companies, respectively, upon their subscriptions to the captial stock of the Terminal Company, computed from the average dates of said payments to the date when payments for said capital stock is made by the New Companies, respectively: [fol. 165] and the Terminal Company agrees to execute and deliver to the New Companies respectively its capital stock, as aforesaid, upon payment therefor being duly made as above provided. Each of the New Companies agrees forthwith to deliver to the Trustee the certificates for nine hundred and ninety-five (995) shares of the capital stock of the Terminal Company upon the terms and conditions named in the Stock Trust Agreement to the same extent and with like effect as though the New Companies and each of them had been parties to the Stock Trust Agreement originally.

Second. The number of directors of the Terminal Company shall be increased from eleven (11) to thirteen (13), so that each of the New Companies can have a representative upon the Board of Directors.

Third. Each of the New Companies assumes all of the obligations of the Stock Trust Agreement and agrees to be bound by the terms and conditions thereof with like force and effect as if they had executed the same originally as a party thereto; and the Old Companies, the Trustee and the Terminal Company do hereby reaffirm their covenants and agreements in the Stock Trust Agreement contained, and reacknowledge the terms and conditions thereof—it being hereby declared to be the intention of the parties hereto and the purpose in the execution of this agreement that the New Companies shall be and do hereby become parties to the Stock Trust Agreement with like force and effect as if they had executed the same originally.

Fourth. The covenants and agreements hereof made by the parties of the first and second parts are several and not joint.

In witness whereof, each of the parties hereto has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed, and attested by its Secretary or an Assistant Secretary the day and year first above written.

[fol. 166] The Atchison, Topeka and Santa Fe Railway Company, by J. W. Kendric., Its Vice-President. (Seal.)

Attest: Edward McBride, Asst. Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, Its President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, Its President. (Seal.)

Attest: George H. Crosby Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, Its President. (Seal.)

Attest: F. H. Hamilton, Secretary.

Union Pacific Company, by R. S. Lovett, Its President. (Seal.)

Attest: Alex Millar, Secretary.

[fol. 167] The Chicago and Alton Railroad Company, by George H. Ross, Its Vice-President. (Seal.)

Attest: H. E. R. Wood, Asst. Secretary.

The Wabash Railroad Company, by F. A. Delano, Its President. (Seal.)

Attest: E. P. Pryor, Asst. Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, Its President. (Seal.)

Attest: C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Asst. Secretary.

Chicago, Burlington and Quincy Railroad Company, by D. Miller, Its President. (Seal.)

Attest: H. W. Weiss, Asst. Secretary.

[fol. 168] The Kansas City Southern Railway Company, by J. A. Edson, Its President. (Seal.)

Attest: R. J. McCarty, Asst. Secretary.

Chicago, Great Western Railroad Company, by S. M. Felton, Its President. (Seal.)

Attest: J. F. Coykendall, Secretary.

Pioneer Trust Company, as Trustee, by Walton H. Holmes, Its President. (Seal.)

Attest: B. H. McGarvey, Secretary.

Kansas City Terminal Railway Company, by H. L. Harmon, Its President. (Seal.)

Attest: C. C. Ripley, Secretary.

[fol. 169] State of Illinois,
County of Cook, ss:

On this 30th day of March, in the year 1910, before me appeared J. W. Kendrick, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. W. Kendrick acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22d day of May, 1911. (Seal.)

[fol. 170] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois.
My commission expires on the 11th day of May, 1912. (Seal.)

[fol. 171] STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of April, in the year 1910, before me appeared H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois.
My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 172] STATE OF MISSOURI,
City of St. Louis, ss:

On this 17th day of May, in the year 1910, before me appeared B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

[fol. 173] STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of June, in the year 1910, before me appeared R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of New York, in the State of New York; that he is the President of Union Pacific Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1911. (Seal.)

[fol. 174] STATE OF ILLINOIS,
County of Cook, ss:

On this 19 day of April, in the year 1910, before me appeared George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is Vice-President of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Robt. J. Bell, Notary Public, Cook County, Illinois. My commission expires on the 23rd day of February, 1911. (Seal.)

[fol. 175] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De LaMater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 176] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of May, in the year 1910, before me appeared A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Dallas, in the State of Texas; that he is the President of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Claude O. Pearcy, Notary Public, City of St. Louis, Missouri. My commission expires on the 17th day of December, 1910. (Seal.)

[fol. 177] STATE OF MISSOURI,
City of St. Louis, ss:

On this 30 day of April, in the year 1910, before me appeared C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of St. Louis, in the State of Missouri; that he is the Vice-President of The Missouri Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donovan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

[fol. 178] STATE OF ILLINOIS,
County of Cook, ss:

On this 28th day of April, in the year 1910, before me appeared D. Miller, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said D. Miller acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the third day of March, 1914. (Seal.)

[fol. 179] STATE OF MISSOURI,
County of Jackson, ss:

On this 4th day of March, in the year 1910, before me appeared J. A. Edson, to me personally known, who being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of The Kansas City Southern Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. A. Edson acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Clarence R. Hall, Notary Public, Jackson County, Missouri. My commission expires on the 15th day of October, 1912. (Seal.)

[fol. 180] STATE OF ILLINOIS,
County of Cook, ss:

On this 24" day of February, in the year 1910, before me appeared S. M. Felton, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago Great Western Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said S. M. Felton acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Charles G. Lavery, Notary Public, Cook County, Illinois. My commission expires on the 5" day of November, 1913. (Seal.)

[fol. 181] COUNTY OF JACKSON,
State of Missouri, ss:

On this 12th day of August, in the year 1910, before me appeared Walton H. Holmes, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of Pioneer Trust Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Walton H. Holmes acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John J. O'Keefe, Notary Public, Jackson County, Mo. My commission expires on the eighth day of June, 1914. (Seal.)

[fol. 182] STATE OF MISSOURI,
County of Jackson, ss:

On this 3rd day of March, in the year 1910, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

[fol. 183] Removal of Trustee and Appointment of Successor Trustee in Stock Trust Agreement Relating to Stock of Kansas City Terminal Railway Company

[fol. 184] Whereas, Pioneer Trust Company, a corporation, Trustee in a certain Stock Trust Agreement between ten Railway Companies, parties of the first part, said Pioneer Trust Company, party of the second part, and Kansas City Terminal Railway Company, party of the third part, relating to stock of the Kansas City Terminal Railway Company, dated June 12, 1909, as amended by First Supplemental Stock Trust Agreement between the said ten Railway Companies, parties of the first part, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company, parties of the second part, Pioneer Trust Company, party of the third part, and Kansas City Terminal Railway Company, party of the fourth part, dated January 24, 1910, was on the 24th day of January, 1933, closed by order of its Board of Directors and was on said date taken in charge by the Finance Commissioner of the State of Missouri, and by

reason thereof a vacancy exists in the trusteeship created by said Stock Trust Agreement as so amended; and

Whereas, in order that there may be no question as to the existence of such vacancy, it is desirable that formal action be taken to remove Pioneer Trust Company from said trusteeship; and

Whereas, it is necessary that a new trustee be appointed;

Now, therefore, a majority of the Railway Companies, parties to said Stock Trust Agreement as so amended [fol. 185] (none of said majority being in default) by this instrument do hereby—

(1) Remove said Pioneer Trust Company from the trusteeship created by said Stock Trust Agreement as so amended; and

(2) Appoint The First National Bank of Kansas City, a corporation duly organized and existing under the laws of United States, a new trustee, or successor trustee, under said Stock Trust Agreement as so amended and in the trusteeship created by said Stock Trust Agreement, as so amended, with all the authority, rights, powers and duties given to the Trustee by said Stock Trust Agreement, as so amended.

This instrument is executed in several counterparts, each an original, by a majority of the Railway Companies not in default, parties to said Stock Trust Agreement as so amended. Said counterparts so executed shall have the same effect as if the signatures of the Railway Companies were attached to a single instrument.

In witness whereof, said Railway Companies have executed this instrument by their duly authorized officers as of the 1st day of March, 1933.

Union Pacific Railroad Company, by W. M. Jeffers, Executive Vice-President. (Seal.)

Attest: C. B. Matthai, Asst. Secretary.

[fol. 186] Missouri Pacific Railroad Company, by E. M. Durham, Jr., Senior Vice-President. (Seal.)

Attest: A. T. Cole, Assistant Secretary.

St. Louis-San Francisco Railway Company, by R. V. Hart, Vice-President. (Seal.)

Attest: L. O. Williams, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, by W. B. Storey, President. (Seal.)

Attest: R. D. Brown, Acting Asst. Secretary.

The Kansas City Southern Railway Co., by C. E. Johnston, President. (Seal.)

Attest: L. J. Hensley, Asst. Secretary.

[fol. 187] Chicago Great Western Railroad Company, by P. H. Joyce, President. (Seal.)

Attest: W. G. Lerch, Secretary.

The Chicago, Rock Island & Pacific Railway Co., by J. E. Gorman, President.

Attest: Carl Nyquist, Secretary.

Chicago, Burlington & Quincy Railroad Co., by Ralph Budd, President. (Seal.)

Attest C. I. Sturgis, Secretary.

Wabash Railway Company, by Walter S. Franklin, President. (Seal.)

Attest: W. F. Bender, Assistant Secretary.

[fol. 188] State of Nebraska,
County of Douglas, ss:

On this 9th day of March, 1933, before me appeared W. M. Jeffers, to me personally known, who being by me duly sworn, did say that he is the executive Vice-President of Union Pacific Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. M. Jeffers acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Omaha, Nebraska, the day and year first above written.

Louis Scholnick, Notary Public within and for said County and State. My commission expires May 9, 1936. (Seal.)

[fol. 189] STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of March, 1933, before me appeared E. M. Durham, Jr., to me personally known, who being by me duly sworn, did say that he is the Senior Vice-President of Missouri Pacific Railroad Company, a corporation, and that the seal afixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said E. M. Durham, Jr., acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis, Mo., the day and year first above written.

W. Jenkins, Notary Public within and for said City and State. My commission expires Feby. 27, 1935. (Seal.)

[fol. 190] STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of March, 1933, before me appeared R. V. Hart, to me personally known, who being by me duly sworn, did say that he is the Vice-President of St. Louis-San Francisco Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said R. V. Hart acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis the day and year first above written.

Walter Studt, Notary Public within and for said City and State. My commission expires Nov. 11, 1936. (Seal.)

[fol. 191] STATE OF ILLINOIS,
County of Cook, ss:

On this 4th day of March, 1933, before me appeared W. B. Storey, to me personally known, who being by me duly sworn, did say that he is the President of The [illegible]chi-

son, Topeka and Santa Fe Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. B. Storey acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

Rudolph G. Rydin, Notary Public within and for said County and State. My commission expires Sept. 19, 1934. (Seal.)

[fol. 192] STATE OF MISSOURI,
County of Jackson, ss:

On this 28th day of Feb'y, 1933, before me appeared C. E. Johnston, to me personally known, who being by me duly sworn, did say that he is the President of The Kansas City Southern Railway Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said C. E. Johnston acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Kansas City, Mo., the day and year first above written.

Carl L. Soderstrom, Notary Public within and for said County and State. My commission expires June 24, 1935. (Seal.)

[fol. 193] STATE OF ILLINOIS,
County of Cook, ss:

On this 1 day of March, 1933, before me appeared P. H. Joyce, to me personally known, who being by me duly sworn, did say that he is the President of Chicago Great Western Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was

signed and sealed in behalf of said corporation by authority of its Board of Directors, and said P. H. Joyce acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Ill., the day and year first above written.

Leonard A. Ross, Notary Public within and for said County and State. My commission expires March 24th, 1936. (Seal.)

[fol. 194] STATE OF ILLINOIS,
County of Cook, ss:

On this 1st day of March, 1933, before me appeared J. E. Gorman, to me personally known, who being by me duly sworn, did say that he is the President of The Chicago, Rock Island & Pacific Railway Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said J. E. Gorman acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

W. Vanderpool, Notary Public within and for said County and State. My commission expires Oct. 27, 1934. (Seal.)

[fol. 195] STATE OF ILLINOIS,
County of Cook, ss:

On this 1st day of March, 1933, before me appeared Ralph Budd, to me personally known, who being by me duly sworn, did say that he is the President of Chicago, Burlington & Quincy Railroad Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ralph Budd acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

A. D. McLane, Notary Public within and for said County and State. My commission expires Mar. 22, 1935. (Seal.)

[fol. 196] State of Missouri,
City of St. Louis, ss:

On this 27th day of February, 1933, before me appeared Walter S. Franklin, to me personally known, who being by me duly sworn, did say that he is the President of Wabash Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Walter S. Franklin acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis, Missouri, the day and year first above written.

Lillian F. Bonville, Notary Public within and for said City and State. My commission expires July 8, 1936. (Seal.)

[fol. 197] Decree of the Circuit Court of Jackson County, Missouri

[fol. 198] Be it remembered that on the 33rd day of the regular March Term, 1933, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 19th day of April, 1933, the following proceedings were had and made of record before Hon. A. Stanford Lyon, Judge of Division No. One in the cause entitled:

In the Circuit Court of Jackson County, Missouri, at Kansas City

No. 420,851

Kansas City Terminal Railway Company, a Corporation; The Atchison, Topeka and Santa Fe Railway Company,

a Corporation, and The Kansas City Southern Railway Company, a Corporation, Plaintiffs,

vs.

Pioneer Trust Company, O. H. Moberly, State Finance Commissioner, and Cornelius Roach, Deputy Finance Commissioner in Charge of Pioneer Trust Company, a Corporation, Defendants

Now on this day the petition of Kansas City Terminal Railway Company, The Atchison, Topeka and Santa Fe Railway Company and The Kansas City Southern Railway Company on behalf of themselves and others similarly situated coming on to be heard, Pioneer Trust Company, the State Finance Commissioner and the Deputy Finance Commissioner in charge having entered their respective appearances herein, and the evidence having been heard and the Court being fully advised in the premises, the Court finds the facts to be as alleged in said petition of Kansas City Terminal Railway Company, The Atchison, Topeka and Santa Fe Railway Company and The Kansas City Southern Railway Company, and that The First National Bank of Kansas City, with its principal place of business in Kansas City, Missouri, has been duly appointed successor trustee under the Stock Trust Agreement and Supplemental Stock Trust Agreement referred to in said petition, and is now the duly qualified successor trustee under said Stock [fol. 199] Trust Agreement and Supplemental Stock Trust Agreement, and that said petitioners are entitled to the relief therein prayed;

It is, therefore, by the court ordered, adjudged and decreed that the State Finance Commissioner or Cornelius Roach, Deputy Finance Commissioner in charge, shall deliver forthwith to The First National Bank of Kansas City as trustee under said Stock Trust Agreement and Supplemental Stock Trust Agreement all shares of stock and all certificates representing the same, which were in the possession of Pioneer Trust Company at the time the State Finance Commissioner took charge of Pioneer Trust Company, and shall execute in the name of Pioneer Trust Company by Cornelius Roach, Deputy Finance Commissioner in charge, all stock powers or assignments appearing on the back of such certificates of stock, duly assigning, transferring and delivering the same to The First National Bank

of Kansas City, Trustee under Stock Trust Agreement, dated June 12th, 1909, and Supplemental Stock Trust Agreement, dated January 24th, 1910, relating to stock of the Kansas City Terminal Railway Company, and shall also assign, transfer and deliver to said The First National Bank of Kansas City as trustee, all moneys, shares of stock, rights, contracts, choses in action, evidences of indebtedness and all other matters or things held by Pioneer Trust Company as trustee under said Stock Trust Agreement and Supplemental Stock Trust Agreement at the time Pioner Trust Company was taken in charge by the State Finance Commissioner, or which may have come into its hands or into the hands of the State Finance Commissioner since said time by reason of or relating to said Stock Trust Agreement or Supplemental Stock Trust Agreement, and that Pioneer Trust Company shall also execute, assign, transfer and deliver to The First National Bank of Kansas City as Trustee all stock powers or assignments appearing on the back of such certificates of stock, duly assigning, trans-
[fol. 200] ferring and delivering the same to The First National Bank of Kansas City as Trustee.

Entered April 19, 1933, in Division No. One by Judge Stanford Lyon.

State of Missouri,
County of Jackson, ss:

I, Lynn G. Buford, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a true and complete copy of the order as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at office in Kansas City, this 13th day of May, 1933.

Lynn G. Buford, Clerk, by L. L. Scannell, Deputy Clerk. (Seal.)

[fol. 201] In Supreme Court of District of Columbia

Rule to Show Cause—Filed May 31, 1933

* * * * * * *

Upon the annexed application of Chicago Great Western Railroad Company and The Kansas City Southern Railway

Company, verified by P. H. Joyce, on the 29th day of May, 1933, it is

Ordered that the above-named respondent, Interstate Commerce Commission, show cause at a session of this court to be held in the courthouse of the Supreme Court of the District of Columbia, in the City of Washington, on the 7th day of June, 1933, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why the prayers of said application for a writ of mandamus should not be granted.

Sufficient reason appearing therefor, let service of this order, and the papers upon which it is granted, on the respondent on or before the 5th day of June, 1933, be deemed sufficient.

Dated Washington, May 31, 1933.

James M. Proctor, Justice of the Supreme Court of the District of Columbia.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 7, 1933

* * * * * * *

The Interstate Commerce Commission, respondent in the above-entitled cause, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the relators' petition contained, for answer thereto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, and as and for a return to the rule to show cause herein issued, answers and says:

[fol. 202] I. Answering paragraphs (1) to (4), inclusive, of the petition, the Commission admits that the relators, Chicago, Great Western Railroad Company and The Kansas City Southern Railway Company are common carriers of persons and property subject to the provisions of the Interstate Commerce Act; admits that each of said relators owns and operates a line of railroad to Kansas City, Mo., which connects there with the railroad of the Kansas City

Terminal Railway Company, hereinafter called the Terminal Company; admits that said Terminal Company owns and operates a union station and other terminal facilities in Kansas City, Mo., and Kansas City, Kans.

II. Answering paragraph (5) of the petition, the Commission admits that on June 12, 1909, a stock trust agreement was entered into between the ten railroad companies (therein termed the Proprietary Companies), which were the then owners in equal parts of all the capital stock of the Terminal Company, as parties of the first part, the Pioneer Trust Company of Kansas City, Mo., as party of the second part, and the Terminal Company, as party of the third part. In answer to the allegations which purport to state the provisions of said stock trust agreement, the Commission alleges that said agreement is the best evidence of its contents and, if said allegations are deemed material, demands that they be proved.

III. Answering paragraph (6) of the petition, the Commission admits and alleges that on June 12, 1909, an operating agreement was entered into between the Terminal Company, the ten (10) Proprietary Companies and the Illinois Trust & Savings Bank, as trustee, containing mutual covenants relating to the construction, maintenance, use, operation and management of the above-mentioned union station and terminal facilities of the Terminal Company; admits and alleges that on January 24, 1910, a supplemental agreement was entered into between the Terminal Company, the relators herein, the ten Proprietary Companies and the Illinois Trust & Savings Bank as trustee, whereby all the provisions of said operating agreement of June 12, 1909, were extended to and made effective as to the relators herein; admits that true copies of said operating agreement and of said supplemental agreement are attached to the petition as Exhibit 1 thereof; and respectfully refers the Court to said copies for full informa-
[fol. 203] tion as to the provisions of said agreements.

IV. Answering paragraph (7) of the petition, the Commission admits that the Terminal Company issued and sold a large amount of its 4 per cent bonds, but disclaims information sufficient to form a belief as to the truth of the allegation that the amount thereof issued and sold was $50,000,000, and if said allegation be deemed material, it

demands proof thereof. Further answering said paragraph, the Commission admits the allegation as to the construction of the union station and other terminal facilities, and as to the use thereof by the relators and others.

V. Answering paragraphs (8) to (18), inclusive, of the petition, the Commission admits that on March 10, 1924, the Missouri-Kansas-Texas Railroad Company (hereinafter called the M-K-T), purchaser at judicial sale of most of the railway properties of Missouri, Kansas & Texas Railway Company, one of the Proprietary Companies, filed with the Commission a petition for an order under the provisions of section 3 (4) of the Interstate Commerce Act, according it the right to use designated portions of the passenger station and other terminal facilities of the Terminal Company; admits that said the M-K-T, in exercise of a right conferred upon it by decree entered in receivership proceedings involving its predecessor company, had theretofore elected not to adopt the operating agreement of June 12, 1909, to which its predecessor had been a party; admits that said petition of the M-K-T alleged that the terms imposed by said operating agreement for the use by the M-K-T of said station and terminal facilities were unjust and burdensome in that it required each of the Proprietary Companies to pay one twelfth of the Terminal Company's taxes and interest on bonded debt without regard to the use of the terminals made by each said company and that the Commission was therein asked to prescribe, upon a user basis, the terms upon which the M-K-T should thereafter be permitted to use said portions of the station and other terminal facilities; admits that, pending hearing and decision upon said petition, the Commission, by its Service Order No. 40, entered under section 1 (15) of the Interstate Commerce Act, ordered the Terminal Company to permit the M-K-T to use said facilities upon the terms and provisions of the operating agreement; [fol. 204] payments in accordance therewith, however, not to be the final measure of compensation for the effective period of the order, but the total compensation for said period to be upon such terms as might be agreed to by the carriers, or failing such agreement, as the Commission might, after subsequent hearing, find to be just and reasonable; admits that the proceeding so instituted by the petition of the M-K-T was designated by the Commission as its

Docket No. 15682, Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company; admits that the petitions of intervention referred to in paragraph (10) of the petition herein, copies whereof are attached to said petition, marked Exhibits 3 and 4, were filed in said Commission proceeding by the relators herein and were allowed by the Commission; admits that petitions of intervention were also filed by the other Proprietary Companies, certain of which were filed in opposition to the petition of the M-K-T and others of which were filed to obtain the same relief as to terms of use of the terminal facilities as was sought by the M-K-T; and alleges that the Terminal Company, respondent in said proceeding, filed a plea to the Commission's jurisdiction in the premises and a motion to dismiss, together with an answer on the merits.

Further answering said paragraphs (8) to (18), inclusive, of the petition, the Commission admits and alleges that in said proceeding No. 15682, Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, it made, issued and served upon the parties thereto, including the relators, its report and order of November 10, 1925 (104 I. C. C. 203), whereby it dismissed the above mentioned petitions of intervention, including those of the relators herein, but retained jurisdiction over the petition of the M-K-T, awaiting decision of a cause pending in the federal courts which involved the issue as to whether the receivership court had erred in confirming the sale to the M-K-T of the properties of the former Missouri, Kansas and Texas Railway Company without imposing the condition that the purchaser assume the undertakings of a proprietary company under the operating agreement of June 12, 1909; admits and alleges that true copies of its said report and order of November 10, 1925 are attached to the petition herein, marked Exhibit 5; and the Commission hereby incorporates the same by reference as a part of this [fol. 205] its answer to said petition, and respectfully refers the Court thereto for a description of the proceeding before the Commission and the issues therein raised, and for full, complete and accurate information as to its statements, findings and conclusions in the premises. Further answering said paragraphs, the Commission alleges that prior to the making and entering of its said report and order, all the parties thereto, including the relators herein,

were accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration on behalf of the various parties thereto, including the relators; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties by their respective counsel, including the particular questions raised by relators in this suit, whereupon the Commission determined said matters and made and entered its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions and order in the premises, and that upon the evidence aforesaid, and as shown in and by its report, the Commission made the findings and stated the conclusions upon which the order is based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said report and order it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of relators, including all material matters covered by the allegations of the petition herein; that said order of November 10, 1925, was not made or issued either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; and that in making said order the Commission did not exceed the authority which had been duly and lawfully conferred upon it.

Further answering paragraph (8) of the petition: In answer to the allegations thereof which purport to set forth or construe undertakings of the relators and the Proprie- [fol. 206] tary Companies under their said agreements of June 12, 1909 and January 24, 1910, the Commission respectfully refers the Court to the copies of said agreements, shown as Exhibit 1 to the petition, for full and correct information in the premises; in answer to the allegations thereof which purport to show facts, circumstances and conditions subsequent to the making of its report and

order of November 10, 1925, the Commission disclaims information sufficient to form a belief as to the truth of said allegations and, if deemed material, demands that they be proved.

Further answering paragraph (13) of the petition, the Commission admits the pendency before it of said proceeding in Docket No. 15682 in so far as it concerns the application of the M-K-T; admits the filing by the relators herein of petitions for rehearing of the Commission's order of November 10, 1925, dismissing relators' intervening petitions and the denial by the Commission of said petitions for rehearing; admits that the relators and the other proprietary companies are using the terminal facilities of the Terminal Company. The Commission disclaims information sufficient to form a belief as to whether the use made of said terminal facilities is the same as prior to November 10, 1925, and therefore neither admits nor denies that it is.

Further answering paragraphs (14) and (15) of the petition, the Commission avers that the allegations therein contained consist of assumptions and conclusions based upon surmise as to results which it is supposed may result from future developments, and that they are, therefore, speculative, immaterial, irrelevant and incompetent and require no answer.

Further answering paragraphs (16) and (17) of the petition, the Commission denies that its action in dismissing by its order of November 10, 1925, the intervening petitions of relators was erroneous in law for the reasons set forth in said paragraphs or otherwise; and denies that such action was either contrary to law, or arbitrary, or deprived relators of rights to which they are entitled under the law.

Further answering paragraph (18) of the petition, the Commission alleges that it did consider and determine upon the merits the asserted violation of paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act, and found that upon the evidence adduced, no violation of said section was shown or established, which finding and con-
[fol. 207] clusion of the Commission in the exercise of its validly conferred jurisdiction cannot be reviewed in a proceeding in mandamus. In answer to the allegation that the relators have no adequate judicial remedy other than by a petition for mandamus, the Commission avers that said allegation is a conclusion of law to which it is not required to make answer.

X. For a further answer to the petition, the Commission alleges that as shown by the petition herein, the relators voluntarily entered into the several agreements referred to covering the use and occupation of the terminal facilities of the Terminal Company; that the terms and conditions of said agreements and the obligations imposed thereby were known and fully understood by the relators at the time they became parties thereto; that the said relators sought in the proceeding before the Commission, and are now seeking, to be relieved of the terms, conditions and obligations of said agreements assumed by them voluntarily and without coercion; that paragraph (4) of section 3 does not confer upon the Commission the power to grant the relief which was sought by the relators.

Except as herein expressly admitted, the Commission denies the truth of each and all of the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of November 10, 1930.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that the rule to show cause be discharged and that the petition be dismissed.

Interstate Commerce Commission, by H. L. Underwood, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Frank McManamy. Jurat omitted in printing.

[fol. 208] In Supreme Court of District of Columbia

Petition of the Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company for Leave to Intervene as Respondents—Filed June 20, 1933.

* * * * * * *

Come now The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway

Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, railroad corporations organized and existing according to law and having their principal places of business in the cities of Topeka, Kans., Chicago, Ill., Omaha, Neb., and Chicago, Ill., respectively, and petition the Court for leave to intervene in the above-entitled and numbered cause as parties respondent and with leave to plead in said cause and participate therein in all respects and to the same extent as though they had been made parties respondent herein in the first instance.

As grounds for this petition, petitioners show:

First. That these petitioners are among the railroad corporations referred to in Paragraph (5) of relators' petition and in Exhibit 2 attached to said petition.

Second. That the petition of the relators in this cause shows on its face that the rights of your petitioners will be vitally affected by any order or orders which may be entered by this Court herein.

Third. That the facts, in so far as they are relevant, upon which the relators reply, as alleged in their petition for writ of mandamus, except in so far as relators plead conclusions of law, are not in dispute.

[fol. 209] Fourth. That if petitioners are permitted to intervene herein as parties respondent, the legal questions involved can be determined in this cause as between the relators and petitioners, thereby avoiding further expensive litigation between the same parties upon the same subject matter.

Fifth. Petitioners state upon information and belief that neither the relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, nor the respondent, Interstate Commerce Commission, do or will interpose objection to these petitioners becoming parties to this action with all the rights of a respondent herein.

Wherefore, the premises considered, petitioners, The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, pray an order of this Court

permitting them to intervene in this cause as parties respondent.

Respectfully submitted, Charles H. Woods, E. A. Boyd, 1211 Railway Exchange, Chicago, Ill.; Bruce Scott, Walter McFarland, 547 W. Jackson Blvd., Chicago, Ill.; W. F. Dickinson, W. A. Peters, La Salle Street Station, Chicago, Ill.; J. M. Souby, 1416 Dodge Street, Omaha, Neb., Attorneys for Petitioners. Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C., Attorney for Petitioners.

[fol. 210] In Supreme Court of District of Columbia

Order Granting Leave to Intervene—June 13, 1933

Upon consideration of the petition filed herein by the Atchison, Topeka and Santa Fe Railway Company; the Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company for leave to intervene as respondents, it is ordered that said motion be, and the same is hereby granted.

In Supreme Court of District of Columbia

Answer of the Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, Interveners, to the Petition of the Relators—Filed June 20, 1933

* * * * * * *

Come now The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, as interveners, by leave of court and for answer to the petitions of the relators—Chicago Great Western Railroad Company and

The Kansas City Southern Railway Company—and in response to the rule to show cause, duly made and entered on the thirty-first day of May, 1933, allege:

First. Interveners admit as true the allegations contained in Paragraph (1) of relators' petition.

Second. Interveners admit as true the allegations contained in Paragraph (2) of relators' petition.

Further answering Paragraph (2) of relators' petition, interveners say that the lines of railroad of relators connect at Kansas City, Mo., with the railroads of the various proprietary companies entering Kansas City, Mo., through the convenient provision for the organization of joint terminal facilities by the corporate control of the Kansas City Terminal Railway Company. The Kansas City Terminal Railway Company was organized not for the purpose of engaging in transportation by railroad of persons and property in interstate commerce. The organization of that company was merely a convenient method of avoiding the necessity of all railroads entering Kansas City for providing their own terminal facilities. The stock ownership of [fol. 211] the terminal company's stock by the proprietary companies was simply a convenient method of providing joint terminal facilities for the common carrier railroads.

Third. Interveners admit as true the allegations contained in Paragraph (3) of relators' petition.

Fourth. Interveners admit as true the allegations contained in Paragraph (4) of relators' petition.

Further answering Paragraph (4) of relators' petition, interveners deny that the terminal company is a common carrier engaged in the transportation of persons and property in interstate commerce in the sense in which relators make the allegation. The terminal company is simply a terminal corporation for the convenience of the proprietary common carriers in connection with the interchange of freight and passengers at Kansas City, Mo. It is a terminal and switching line. The terminal company issues no bills of lading for its own account. In receiving and delivering to a line haul carrier for transportation of any goods or merchandise, it merely acts as the agent of such line haul carrier and assumes no obligations other than that of a switching line.

Fifth. Interveners admit as true the allegations contained in Paragraph (5) of relators' petition.

Sixth. Interveners admit as true the allegations contained in Paragraph (6) of relators' petition.

Seventh. Interveners admit as true the allegations contained in Paragraph (7) of relators' petition.

Eighth. Interveners admit as true the following allegations in Paragraph (8) of relators' petition:

"Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rates, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under [fol. 212] said Operating Agreement. The foregoing payments were required to be made without respect to the amount of use made of the Terminal Company's facilities by the Proprietary Companies, including relators."

Further answering Paragraph (8) of relators' petition, interveners allege that the matter of the distribution of the charges to the proprietary companies, as to those items in Article II of the operating agreement which are paid upon a user basis, are not quite so simple as alleged by the relators. The Court's attention is called to Section 6 of Article II of the operating agreement. It will be noted that under this section the terminal property is divided into a number of sections, or zones. A separate accounting as to operation, maintenance, renewal, repair, and other expenses of the terminal company is kept for each zone. The proprietary companies contribute toward the payment of these items only in proportion to their use of the facilities within the zone. If, during any month, any one of the proprietary companies makes no use *to* any particular zone, it participates in no payment of the items involved in connec-

tion with that zone. In a word, the payment of the items which are dealt with under a user basis varies from month to month and as between the different proprietary companies in each of the varying zones. Each and all of the proprietary companies have an equal right to use any one or all of the zones if it sees fit to exercise that right. No company participates in the maintenance and other items of expense in connection with any zone in any month in which it fails to make use thereof or to exercise its rights. The participation of each proprietary company in the maintenance expense is based entirely upon its proportionate use of a certain zone. There is therefore no fixed percentage which could be arrived at as a permanent factor upon which to base an appointment of the items which are payable on a user basis. The percentage of such items is entirely within the control and is at the election of the company which sees fit to make use of the facilities in any particular zone. Each company's use varies from month to month and in the same month as to any zone.

Further answering Paragraph (8) of relators' petition, interveners allege that each of the proprietary companies, including the relators, who are parties to the operating [fol. 213] agreement and the supplement thereto, designated by relators as Exhibit 1 to the petition, who are the owners of all of the stock of the terminal company, have the right under the terms of the contract to make such use of the terminal company's facilities as it elects to use. The contract grants no right to any proprietary company not fully granted to each and all of the other proprietary companies. The terms of the contract itself provide that such a right to use the terminal facilities shall be granted by the terminal company to all of the parties to the contract without discrimination. Certain of the proprietary companies have seen fit to exercise the right so granted by the operating agreement to a greater extent than other proprietary companies. Such greater use by certain of the proprietary companies has never at any time prevented the other proprietary companies, including the relators, from exercising their full rights to the fullest use of the terminal facilities when they elected to exercise such rights. There is and, in fact, has been no discrimination as to the use of such facilities by any of the proprietary companies. Neither the terminal company nor any of the proprietary companies have ever denied and are not now denying the

right of the relators to make the fullest possible use of the terminal facilities and to place themselves upon an equality with all other users if they so elect. The alleged discrimination does not in fact exist. What the relators term discrimination is not the creature of the operating agreement but, if it exists at all, it is the creature of the relators themselves in that they have failed to exercise to the full rights which have been granted to them under the operating agreement and which rights the relators voluntarily sought.

Further answering Paragraph (8) of relators' petition, interveners allege that the discrimination referred to in relators' petition—which discrimination is not admitted but is specifically denied—if it existed, is a result of the contract voluntarily entered into by the parties and is not such a discrimination as comes within the terms of the Interstate Commerce Act and with which the Interstate Commerce Commission would have jurisdiction to deal.

Interveners admit upon information and belief that the sums of money shown in Paragraph (8) of relator's peti- [fol. 214] tion and in Exhibit 2 to said petition are true and correct. Interveners allege, however, that said payments were made on the basis of the operating agreement entered into between each and all of the proprietary companies, including the relators, and were the only payments which could have been made in compliance with said agreement.

Further answering Paragraph (8), interveners allege that the gist of relators' petition lies in the fact that it is seeking to have this Court authorize and direct the Interstate Commerce Commission to take jurisdiction to determine as to whether or not the relators may remain proprietors of the terminal company through stock ownership, with all the rights and privileges growing out of that proprietorship, and at the same time permit them to avoid the terms of the contract under which they became such proprietors. Interveners allege that the Interstate Commerce Act and no other act of Congress has conferred jurisdiction upon the Interstate Commerce Commission to rewrite contracts of the parties, however improvidently made, under the terms of which contracts the parties became owners of property.

Ninth. Interveners admit as true the allegations in Paragraph (9) of relators' petition, but deny the relevancy thereof.

Further answering Paragraph (9) of relators' petition, interveners say that the legal status of the Missouri-Kansas-Texas Railroad Company in its use of the terminal facilities of the terminal company at Kansas City differs materially from that of the relators herein. The Missouri-Kansas-Texas Railroad Company had no proprietary rights, through stock ownership or otherwise, in said terminal property or its facilities. That company was and is entering upon the property and using the terminal facilities, ownership of which is in others. It has not now and never has had an ownership in the property or facilities. It was not a successor by assignment to the rights of any previous owner. It was not a party to the operating agreement. It entered the property and used the facilities upon a conditional sufferance. Pending further agreement between itself and the proprietary companies, the meeting of the conditions of user conferred no proprietary rights. Failure to meet the conditions would terminate the sufferance. Unless by process of condemnation or by some available legal remedy it should acquire a right of entry and [fol. 215] user, it would become, after failure to meet the conditions of entry and user, a mere trespasser upon the property of others.

The legal status of the relators is quite different. They enter the property and use the facilities not by sufferance but as joint and equal owners with the other ten owners of the terminal company stock. They became joint and equal owners of the terminal company stock with full knowledge of the fact that the property of the terminal company to which they are acquiring joint and equal stock ownership is encumbered by a deed of trust to secure the payment of bonds, the proceeds of which, together with the proceeds of the sale of stock, were used to acquire the property and to construct the facilities. Upon signing the operating agreement the relators acquired specific property and user rights equal to that of the other ten proprietary companies. They likewise assumed obligations equal to, no greater and no less than, the other ten companies. Among other obligations so assumed was that of a share and share alike contribution to the payment of the bonds and interest so as to remove the cloud upon the title to the terminal company property and a similar contribution to the payment of taxes and other levies, which, if unpaid, would jeopardize the

title. They have all the property rights and all of the user rights that are possessed by any proprietary company. If and when the encumbrance is removed, they will, as equal owners of the terminal company stock, share equally with all the other proprietors in the profits and losses which may accrue from the operation of the terminal property.

The failure to exercise these rights or the partial exercise of such rights is a matter of the relators' own election. With such election the Interstate Commerce Commission, this Court, and the other proprietary companies have no concern and over such election they have no control. There is no process of law, condemnation or otherwise, by which these rights now possessed can be enlarged. As common carriers, the relators can not acquire this property and these facilities for their service of the public as common carriers. They have already done that and the property is being so used by the relators.

The relators are seeking to have this Court hold that the Interstate Commerce Commission has jurisdiction to [fol. 216] abrogate a contract lawfully entered into and to rewrite that contract for the parties This, in spite of the fact that it was under the terms of such a contract that the parties acquired the title to the stock of the terminal company, the owner of the very property in question. There is a total absence of any allegation of fraud in the procurement of the contract and there is no charge of misrepresentation of facts, nor is there any other charge upon which a Court of Equity could order the abrogation or the modification of a contract. The Interstate Commerce Commission has not been given the powers and functions of a Court of Equity. Its functions are strictly limited and specifically defined by statute. The powers here sought by the relators are not conferred upon the Interstate Commerce Commission by any provision of law.

Further answering Paragraph (9) of relators' petition, the attention of the Court is called to the decision of the Supreme Court of the United States in the case of Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, et al., 283 U. S. 380, 391, 392. This case involved the power of the Commission to require the carriers to construct a union station and joint facilities at Los Angeles, Calif. The Court held that the Interstate Com-

merce Commission had no such power or authority. Th
language of the Court is as follows:

" • • • In deciding that the Congress had given
the Interstate Commerce Commission no power to requi
the building of such a union terminal as that projected i
this case, this Court adverted to the extent of the authorit
that would be involved and the effect of its exercise upo
local interests. The Court said (280 U. S. pp. 68, 69):

'Such authority,, if conferred in Los Angeles, would hav
application to all interstate railroad junctions, includin
the numerous large cities of the country, with their res
dential, commercial, shopping, and municipal centers no
fixed and established with relation to existing terminals.
would become a statute of the widest effect and would ent
into the welfare of every part of the country. Various i
terests would be vitally affected by the substitution of
union station for the present terminals. A selection of i
site from the standpoint of a city might greatly affect pro
erty values and likewise local transportation systems. Th
[fol. 217] exercise of such power would compel the carrie
to abandon existing terminals, to acquire new land an
rights of way and enter upon new construction, to aba
don large tracts and to sell territory of the same exte
as no longer necessary for the use of the carriers.

'There would have to be tribunals to apportion the e
penditures and cost as between the carriers. A prop
statute would seem to require detailed directions, and w
should expect the intention to be manifested in plain ter
and not to have been left to be implied from varied regul
tory provisions of uncertain scope. It would be a mon
mental work and one requiring the most extensive exerci
of expert engineering and railroad construction. It wou
make possible great changes of much importance in th
plans of every city and in the rearrangement and mut
tions of railroad property and public and private busine
structures everywhere. We find no statutory preparati
for the organization of such machinery.' "

Certainly if the Interstate Commerce Commission,
decided by the Supreme Court, would be without power
compel the railroads entering Kansas City to construct
union station and joint facilities, then it certainly follow
that where the Kansas City railroads voluntarily organiz

a corporation for the purpose of constructing and maintaining a union station and joint facilities and voluntarily entered into a contract under the terms of which that corporation which they had created was to carry out the purpose and under the terms of which each of the constituent companies should participate, it certainly follows as a matter of logic that the Interstate Commerce Commission would have no power to do indirectly that which it is without power to do directly. The voluntary action of the carriers in connection with the union station at Kansas City could not have been compelled. It is certainly not within the power of the Commission, by compulsion, to require such carriers to change their relationship to the property so voluntarily created.

Tenth. Interveners admit as true the allegations contained in Paragraph (10) of relators' petition.

[fol. 218] Eleventh. Interveners admit the allegations of Paragraph (11) of relators' petition in so far as it is quoted below:

"Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5."

Further answering Paragraph (11) of relators' petition, interveners deny that the Commission disregarded any of the facts and circumstances involved in the determination of the case. The Commission had before it and gave careful consideration to the operating agreement. It very properly found that the payment of bonds, interest, and taxes was not a payment for use but was a capital charge. The relators, by their allegations in Paragraph (11), show a total misconception of the entire tenor and meaning of the operating agreement which is attached to the petition as Exhibit 1. Under the terms of this agreement, the relators did not simply acquire a right to use the facilities of the

terminal company; they acquired stock in the corporation which has title to the property. The payments which they are to make under the operating agreement are to be made in protection of that title. The provisions for distributing the maintenance costs on a user basis had nothing to do with the protection of the title, but is an entirely different matter. The relators appear to take the position that they may continue to retain the stock ownership in the terminal company which they acquired under the provisions of a contract, and at the same time be relieved from the duty and obligation of paying the purchase price. In the absence of fraud, the Interstate Commerce Commission, a court of law, or a court of equity would not have power to grant such relief.

In lieu of the statement of the relators in Paragraph (11) as to the Commission's decision in its Docket No. 15682, we [fol. 219] quote as full answer thereto the language of the Commission itself:

"Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The

power and authority thus invoked are not conferred by the quoted paragraph.

"Certain of the interveners cite the provision of section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient and uneconomical operation of their railways, to cause misapplication by them of funds created for an en- [fol. 220] tirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

"Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect

whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed, by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equi- [fol. 221] table titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

"An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Twelfth. In answer to Paragraph (12) of relators' petition, interveners say it is true that the Commission by its order in the case of Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, No. 15682, entered an order dismissing the intervening petitions filed by the Chicago and Alton Railroad Company and its receivers; the Chicago, Milwaukee and St. Paul Railroad Company; Wabash Railway Company; the St. Louis-San Francisco Railway Company; and the relators, the Kansas City Southern Railway Company and the Chicago Great Western Railroad Company. Interveners deny, however, that since the entry of said order the re-

lators have had no right to be heard in said cause and deny that they have not had a right of review of any order which may be made therein in defense of their rights.

As a positive fact, the following interveners in said Docket No. 15682 were heard and are still participating in said cause: The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Missouri Pacific Railroad Company. These interveners last above named were seeking by their intervening petitions to protect their rights in the property as effected by the user rights sought by the Missouri-Kansas-Texas Railroad Company. The relators and the interveners whose intervening petitions were dismissed as shown by the intervening petitions attached to the petition, were seeking to have the Commission change their relation to the property by [fol. 222] abrogation and modification of the contract under which they acquired the terminal stock. The relators have no grounds to state that the Commission would have refused to entertain an intervening petition in opposition to the Missouri-Kansas-Texas Railroad Company's claim nor have they occasion to state that the Commission would not have heard them in protection of their rights thereunder. The only conclusion that the Commission reached was that it did not have jurisdiction to grant to the relators the relief which they sought in their intervening petitions. In so far as their interests are affected by any order which the Commission may make as to the uses of the property by the Missouri-Kansas-Texas Railroad Company, a non-proprietary company, the relators could have sought and obtained a full hearing. The relators by their intervening petitions, being in a different legal status from the Missouri-Kansas-Texas Railroad Company, were seeking a relief which the Commission had no jurisdiction to grant.

Thirteenth. In answer to Paragraph (13) of relators' petition, interveners admit that subsequent to the report of the Commission in docket No. 15682 on November 10, 1925, the right of the Missouri-Kansas-Texas Railroad Company, which was not a party to the operating agreement and which was not one of the proprietary companies, to elect not to assume the operating agreement was sus-

tained in the Court. Interveners also admit that in March, 1931, the Missouri-Kansas-Texas Railroad Company filed with the Interstate Commerce Commission an application for further hearing in said cause for the purpose of having the Commission determine the amount of compensation which should be paid for a limited use of the facilities of the terminal company. Interveners also admit that this application for a rehearing was the next step taken in the cause before the Commission after the Commission's order of November 10, 1925. Interveners also admit that the relators herein filed a petition with the Commission seeking a rehearing upon the Commission's order of November 10, 1925, in so far as it dismissed their intervening petitions in that cause and that said petition for rehearing was denied. Interveners admit that the Interstate Commerce Commission has had numerous hearings growing out of the complaint of the Missouri-Kansas-Texas Railroad Company, the last of such hearings being had on June 1, 1933.

[fol. 223] Interveners deny that relators will and have been unable to take any part in said hearings in order to protect their interests and deny that the Commission's order of November 10, 1925, terminated and barred their right to be heard. The Rules of Practice of the Interstate Commerce Commission, and particularly Paragraph (1) 1 of Rule II, permit anyone under the Interstate Commerce Act to complain to the Commission and anyone having an interest in any complaint may petition for leave to intervene in any pending proceeding prior to or at the time that it is called for hearing, but not after except for good cause shown. In truth and in fact the Interstate Commerce Commission permitted the proprietary companies under the operating agreement to intervene in said cause and to be heard in so far as their interests might be affected by any order which the Commission might make in said cause on the complaint of the Missouri-Kansas-Texas Railroad Company. Relators by their intervening petitions did not seek to protect their rights as they might be affected by any order which might be made in connection with the complaint of the Missouri-Kansas-Texas Railroad Company. On the other hand, the relators, by their intervening petitions, sought to have other and different rights adjudicated and sought affirmative relief, which the Commission prop-

erly decided was beyond its jurisdiction to grant. After the dismissal of these intervening petitions by the relators, they had as a matter of right until June 1, 1933, to file an intervening petition with the Interstate Commerce Commission for the purpose of participating in said cause and seeking to be heard on the question as to whether any order or orders made upon the complaint of the Missouri-Kansas-Texas Railroad Company would in any way affect their rights in the use and ownership of the property. For good cause shown, these relators could have, after June 1, 1933, sought to appear and be heard in said cause for their protection of rights.

Relators wholly disregarded the nature of their intervening petitions and the affirmative action there sought. They also wholly disregard the difference between their legal status as stock owners of the terminal company property with full rights of use and that of the Missouri-Kansas-Texas Railroad Company which had no property rights but which was only seeking a limited use under such com- [fol. 224] pensation as would be fair and reasonable for such use.

It is admitted that temporarily and until final action shall be taken by the Commission or by the Courts, in the event the case shall come before the Courts, the Missouri-Kansas-Texas Railroad Company is using the terminal facilities under the terms of the operating agreement.

Fourteenth. For their answer to Paragraph (14) of relators' petition, interveners say that the issues involved in docket No. 15682 are entirely separate and distinct from the issues which are raised by the relators in their intervening petitions. The Missouri-Kansas-Texas Railroad Company is seeking by process in the nature of condemnation to be permitted to use, upon conditions and for the compensation which may be fixed by the Commission, the property of others. No order that the Commission can or will make could have the effect of conferring upon the Missouri-Kansas-Texas Railroad Company any title to the terminal properties in Kansas City. The only order which the Commission could make would be an order requiring, upon conditions named, the proprietary companies and the terminal company to permit the Missouri-Kansas-Texas Railroad Company to a use of the facilities, which use would have to be limited by the terms of the order itself. The

relators by their intervening petitions, on the other hand, are seeking to have the Commission determine rights of property which were acquired through a contract legally made and duly executed by the relators. The relators are seeking to have this Court hold that the Commission has jurisdiction by order to determine that the title of the relators and their interest in the terminal company stock itself shall not be equal to but shall be something less than that which they acquired by the execution of the contract. By the same token, relators are seeking to have this Court hold that the Interstate Commerce Commission has jurisdiction to determine that the ownership of the terminal company stock by the other proprietary companies shall be something greater or less than that which was acquired through the execution of the contract.

Further answering Paragraph (14) of relators' petition, the effect of any order which the Commission may make in favor of the Missouri-Kansas-Texas Railroad Company will not only have no effect upon the title to the terminal [fol. 225] company stock but also will relieve the relators and all other proprietary companies of certain expenses which are now distributed among all companies on the user basis. The upkeep of the property and the maintenance expenses are divided among all users upon a user basis. It naturally follows that, other things being equal, the greater the number of users the less each user will have to pay as its proportion of those expenses which are so divided.

Further answering Paragraph (14) of relators' petition, interveners neither affirm nor deny the presumptions alleged as to the action that the Commission may or may not take in connection with docket No. 15682 as to the compensation which the Missouri-Kansas-Texas Railroad Company shall pay for the use of the terminal facilities. The correctness or incorrectness of such a presumption is not within the knowledge of relators or interveners. What the conclusions of the Commission — as to the rights and privileges which the Missouri-Kansas-Texas Railroad Company shall enjoy in the use of the terminal facilities can not, of course, be known until final determination of the cause.

Fifteenth. In answer to Paragraph (15) of relators' petition, interveners say that the relators throughout this

paragraph have again failed to make the legal distinction between property rights acquired under the contract and user rights which may be acquired, either by agreement or by order, by non-proprietary companies not parties to the contract and who are seeking no title to the property.

Sixteenth. Answering Paragraph (16) of relators' petition, interveners say that all of the allegations contained therein are conclusions of law with which interveners do not agree and which constitute the legal question to be determined by this Court.

The relators failed to point out to this Court any legal provision which empowers the Interstate Commerce Commission to grant to relators the relief which they are seeking. Interveners deny that there is any such provision of law.

Seventeenth. The allegation in Paragraph (17) of relators' petition also constitutes conclusions of law with which interveners do not agree and constitutes the legal question to be determined by this Court.

[fol. 226] Eighteenth. In answer to Paragraph (18) of relators' petition, interveners say that the relators have again pleaded conclusions of law which constitute the legal questions which are to be determined by this Court.

Further answering Paragraph (18), interveners deny that relators are without adequate legal remedy. Under the Rules of Practice of the Interstate Commerce Commission, after the Commission had determined that it had no jurisdiction to grant the relief sought by relators they had an opportunity to file an intervening petition for the purpose of having their rights protected in so far as those rights might be affected by any order made in docket No. 15682. In the event the Commission entered an order which relators deemed to be unlawful because not protecting such rights, relators had the right and power under the law to bring an action in court to determine such rights. If this legal remedy has been lost, it has been lost through the laches of relators and not because of any action of the Interstate Commerce Commission in refusing to take jurisdiction to grant the relief which they had sought.

Nineteenth. Interveners further say that none of the admissions made by the interveners as to the truth of facts alleged in the relators' petition are to be taken and con-

sidered as an admission that such facts are pertinent and relevant to the relief sought by relators in this cause. Interveners allege that none of the facts, although admitted to be true, are relevant and that if true they do not constitute a basis upon which the Court could found a writ of mandamus.

Twentieth. Interveners further say that the order of the Commission dismissing the intervening petitions of the relators in docket No. 15682 was a negative order and is not subject to review by the courts in a proceeding of mandamus or otherwise. Such has been so held by the Supreme Court of the United States in many decisions, the last of which is the case of Interstate Commerce Commission v. United States of America on the relation of J. C. Campbell and others, trading as the Birch Valley Lumber Company, being Cause No. 748, on the assignment to the Supreme Court for the October term, 1932, and decision handed down May 8, 1933 (not as yet published in the official reports).

[fol. 227] Wherefore, the premises considered, interveners pray an order of this Court denying the writ of mandamus and dismissing the cause

Respectfully submitted, Charles H. Woods, E. A. Boyd, 1211 Railway Exchange Bldg., Chicago, Ill.; Bruce Scott, Walter McFarland, 547 W. Jackson Blvd., Chicago, Ill.; W. F. Dickinson, W. A. Peters, La Salle Street Station, Chicago, Ill.; J. M. Souby, 1416 Dodge Street, Omaha, Neb., Attorneys for Interveners. Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C., Atty. for Petitioners.

Duly sworn to by Charles H. Woods. Jurat omitted in printing.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

PETITION OF KANSAS CITY TERMINAL RAILWAY COMPANY FOR LEAVE TO INTERVENE AS RESPONDENT—Filed June 22, 1933

* * * * * * *

Comes now Kansas City Terminal Railway Company, and petitions the Court for leave to intervene in the above

[fol. 228] entitled and numbered cause as a party respondent and with leave to plead in said cause and participate therein in all respects and to the same extent as though it had been made a party respondent herein in the first instance.

As grounds for this petition, petitioner shows:

First. That the petition of the relators in this cause shows on its face that the rights of your petitioner will be vitally affected by any order or orders which may be entered by this Court herein.

Second. That the facts, in so far as they are relevant, upon which the relators rely, as alleged in their petition for writ of mandamus, except in so far as relators plead conclusions of law, are not in dispute.

Third. That if petitioner is permitted to intervene herein as party respondent, the legal questions involved can be determined in this cause as between the relators and this petitioner, thereby avoiding further expensive litigation between the same parties upon the same subject matter.

Fourth. Petitioner states upon information and belief that the respondent, Interstate Commerce Commission, does not and will not object to this petitioner becoming a party to this action with all the rights of a respondent herein.

Wherefore, the promises considered, petitioner, Kansas City Terminal Railway Company, prays an order of this Court permitting it to intervene in this cause as a party respondent.

Respectfully subm. ted, Lawrence H. Cake, 1040 Washington Building, Washington, D. C. Samuel W. Sawyer, 1900 Fidelity Bank Building, Kansas City, Missouri. John H. Lathrop, 1900 Fidelity Bank Building, Kansas City, Missouri. George O. Pratt, 1900 Fidelity Bank Building, Kansas City, Missouri.

[fol. 229] In Supreme Court of District of Columbia

Memorandum

June 22, 1933—Leave granted Kansas City Terminal Railway Co. to intervene as party respondent. Adkins, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF KANSAS CITY TERMINAL RAILWAY COMPANY, INTERVENER, TO THE PETITION OF THE RELATORS—Filed June 22, 1933

* * * * * * *

Comes now Kansas City Terminal Railway Company as intervener, by leave of court and for answer to the petition of the relators—Chicago Great Western Railroad Company and The Kansas City Southern Railway Company—and in response to the rule to show cause, duly made and entered on the thirty-first day of May, 1933, alleges:

First. Intervener admits as true the allegations contained in Paragraph (1) of relators' petition.

Second. Intervener admits as true the allegations contained in Paragraph (2) of relators' petition.

Further answering Paragraph (2) of relators' petition, intervener says that the lines of railroad of relators connect at Kansas City, Missouri, with the railroads of the various proprietary companies entering Kansas City, Missouri and Kansas City, Kansas, through the use of the joint terminal facilities owned and operated by Kansas City Terminal Railway Company, intervener, and also in many instances through direct connections with such railroads.

Third. Intervener admits as true the allegations contained in Paragraph (3) of relators' petition.

Fourth. Intervener admits as true the allegations contained in Paragraph (4) of relators' petition.

Further answering Paragraph (4) of relators' petition, intervener admits that it is a carrier engaged in interstate commerce but states that it is a terminal corporation furnishing terminal facilities for the proprietary common carriers in connection with the interchange of freight and passengers at Kansas City, Missouri and Kansas City, Kansas. It is a terminal and switching line. In receiving and delivering to a line haul carrier for transportation, any [fol. 230] goods or merchandise, it acts as the agent of such line haul carrier and assumes no obligations other than that of a switching line.

Fifth. Intervener admits as true the allegations contained in Paragraph (5) of relators' petition.

Sixth. Intervener admits as true the allegations contained in Paragraph (6) of relators' petition.

Seventh. Intervener admits as true the allegations contained in Paragraph (7) of relators' petition.

Eighth. Intervener admits as true the following allegation in Paragraph (8) of relators' petition:

"Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rates, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under said Operating Agreement."

but denies the remainder of said paragraph except as hereinafter admitted.

Further answering Paragraph (8) of relators' petition, intervener alleges that the matter of the distribution of the charges to the proprietary companies, as to those items in Article II of the operating agreement which are paid upon a user basis, is not precisely as alleged by the relators. Under Section 6 of Article II of the Operating Agreement the property of the Kansas City Terminal Railway Company is divided into a number of zones. A separate accounting as to operation, maintenance, renewal, repair, and other expenses of the Kansas City Terminal Railway Company is kept for each zone. The proprietary companies contribute toward the payment of these items only in proportion to their use of the facilities within the zone. If, during any month, any one of the proprietary companies makes no use of a particular zone, it participates in no payment of the items involved in connection with that zone. [fol. 231] The payment of the items which are dealt with

under a user basis varies from month to month and as between the different proprietary companies in each of the varying zones. Each and all of the proprietary companies have an equal right to use any one or all of the zones if seen fit to exercise that right. No company participates in the maintenance and other items of expense in connection with any zone in any month in which it fails to make use thereof or to exercise its rights. There is therefore no fixed percentage which could be arrived at as a permanent factor upon which to base an apportionment of the items which are payable on a user basis. The percentage of such items is entirely within the control and is at the election of the company which sees fit to make use of the facilities lying within any particular zone. Each company's use varies from month to month and in the same month as to any zone.

Further answering Paragraph (8) of relators' petition, intervener alleges that each of the proprietary companies, including the relators, who are parties to the Operating Agreement and the Supplemental Operating Agreement, designated by relators as Exhibit 1 to the petition, who are the owners of all of the stock of the Terminal Company, have the right under the terms of the contract to make such use of the Terminal Company's facilities as it may elect to use. No proprietary company has any greater right to the use of the facilities than any other proprietary company. Certain of the proprietary companies have seen fit to exercise their right to use so granted by the Operating Agreement to a greater extent than other proprietary companies. Such greater use by certain of the proprietary companies has never at any time prevented the other proprietary companies, including the relators, from exercising their full rights to the fullest use of the terminal facilities. No discrimination in fact exists as to the use of such facilities by any of the proprietary companies. What the relators term "discrimination" is not created by the terms of the operating agreement, but it is the result of the failure of relators to exercise the full rights which have been granted to relators under and by virtue of the operating agreement.

Further answering Paragraph (8) of relators' petition, intervener alleges that if the matters alleged in relators' petition amount to a discrimination, which is not admitted

[fol. 232] but is specifically denied by intervener, it is the result of a contract voluntarily entered into by the parties and is not such a discrimination as comes within the terms of the Interstate Commerce Act.

Intervener is without present knowledge as to the exact correctness of the sums of money stated in Paragraph (8) of relators' petition and in Exhibit 2 to said petition, but believes that the same are all substantially correct on the basis made up, but denies that the basis of measuring use adopted by relators is a true measure of actual use. Intervener denies, however, that said sums illustrate any gross discrimination as alleged in relators' petition. Intervener alleges that said payments were made on the basis of the operating agreement entered into between each and all of the proprietary companies, including the relators, and were the only payments which could have been made in compliance with said agreement.

Further answering Paragraph (8) of relators' petition, intervener states that said operating agreement and the agreements of the proprietary companies to pay their proportionate parts of interest and taxes and the principal of said bonds, as provided therein, were in pursuance thereof pledged with the trustee under the mortgage securing said bonds as additional security for said bonds, that said trustee is not a party to said case No.. 15,682 and that the Interstate Commerce Commission has no power in said case No. 15,682, or otherwise, to make any order adversely affecting the rights of the holders of said bonds.

Ninth. Intervener admits as true the allegations in Paragraph (9) of relators' petition, but denies the relevancy thereof.

Further answering Paragraph (9) of relators' petition, intervener says that the legal status of the Missouri-Kansas-Texas Railroad Company in its use of the terminal facilities of intervener at Kansas City differs materially from that of the relators herein, in that the Missouri-Kansas-Texas Railroad Company has no proprietary right whatsoever in said Terminal property and facilities. Unless Missouri-Kansas-Texas Railroad Company meets the conditions imposed by the Interstate Commerce Commission in the proceedings pending before the Commission, it will become a mere trespasser upon the property of others. In contrast, relators enter the property and use

the facilities as joint and equal owners with the other [fol. 233] owners of the Terminal Company. By virtue of their stock ownership and by virtue of the operating agreement, relators acquired specific property and user rights equal to that of all of the other proprietary companies. Relators likewise assumed obligations equal to, no greater and no less than, the other proprietary companies. Their stock ownership was acquired with full knowledge of the fact that the property of the Terminal Company was encumbered by a deed of trust to secure the payment of bonds, and they assented to the pledge of their obligations under the operating agreement to secure said bonds.

A failure to exercise the rights acquired is a matter of relators' own election. With such election the Interstate Commerce Commission, this Court, and the other proprietary companies have no concern and over such election they have no control. There is no process of law, condemnation or otherwise, by which these rights now possessed can be enlarged, or the obligations assumed diminished.

Tenth. Intervener admits as true the allegations contained in Paragraph (10) of relators' petition, except that it denies that all of the smaller users filed intervening petitions similar to relators.

Eleventh. Intervener admits the allegations of Paragraph (11) of relators' petition in so far as it is quoted below:

"Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5."

Further answering Paragraph (11) of relators' petition, intervener denies that the Commission disregarded any of the facts and circumstances involved in the determination of the case, and denies the conclusions contained in said paragraph (11). Consideration of the opinion discloses not

only that the Commission did not disregard any material [fol. 234] facts and circumstances but that in truth and in fact it gave careful consideration to the operating agreement and all of the terms thereof.

Twelfth. In answer to Paragraph (12) of relators' petition, intervener admits that the Commission by its order in the case of Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, No. 15682, entered an order dismissing the intervening petition filed by the Chicago and Alton Railroad Company and its receivers; the Chicago, Milwaukee and St. Paul Railroad Company; Wabash Railway Company; St. Louis-San Francisco Railway Company; and the relators, the Kansas City Southern Railway Company and the Chicago Great Western Railroad Company, but denies that the entry of such order had the effect of denying relators the right to be heard in said cause and foreclosed relators from the right to review of such order.

Thirteenth. In answer to Paragraph (13) of relators' petition, intervener admits that subsequent to the report of the Commission in docket No. 15682 on November 10, 1925, the right of the Missouri-Kansas-Texas Railroad Company, which was not a party to the operating agreement and which was not one of the proprietary companies, to elect not to assume the operating agreement was sustained in Court; that in March, 1931, the Missouri-Kansas-Texas Railroad Company filed with the Interstate Commerce Commission an application for further hearing in said cause for the purpose of having the Commission determine the amount of compensation which should be paid for a limited use of the facilities of the Terminal Company; that this application for a rehearing was the next step taken in the cause before the Commission after the Commission's order of November 10, 1925; that the relators herein filed a petition with the Commission seeking a rehearing upon the Commission's order of November 10, 1925, in so far as it dismissed their intervening petitions in that cause and that said petition for rehearing was denied; that the Interstate Commerce Commission has had numerous hearings growing out of the complaint of the Missouri-Kansas-Texas Railroad Company, the last of such hearings being had on June 1, 1933, and that thus intervener's facilities are being

used in a very similar way (though not precisely the same) as on November 10, 1925.

[fol. 235] Intervener denies, however, that relators have been and will be unable to take any part in said hearings in order to protect their interests and denies that the Commission's order of November 10, 1925, terminated and barred their right to be heard.

Fourteenth. Answering Paragraph (14) of relator's petition, intervener says that said paragraph consists entirely of legal conclusions and therefore this intervener denies the same.

Fifteenth. Answering Paragraph (15) of relators' petition, intervener admits that the Receivers of the Wabash Railway Company have undertaken to renounce the operating agreement but states that the other allegations of said paragraph are conclusions of law and therefore denies the same.

Sixteenth. Answering Paragraph (16) of relators' petition, intervener says that all of the allegations contained therein are conclusions of law with which intervener does not agree and which constitute the legal question to be determined by this Court and intervener therefore denies the allegations of Paragraph (16).

Seventeenth. The allegation in Paragraph (17) of relators' petition also constitutes conclusions of law with which intervener does not agree and constitutes the legal question to be determined by this Court and intervener therefore denies the allegations of Paragraph (17).

Eighteenth. In answer to Paragraph (18) of relators' petition, intervener says that the relators have again pleaded conclusions of law which constitute the legal questions which are to be determined by this Court and intervener therefore denies the allegations of Paragraph (18).

Further answering Paragraph (18), intervener denies that relators are without adequate legal remedy. Under the Rules of Practice of the Interstate Commerce Commission, after the Commission had determined that it had no jurisdiction to grant the relief sought by relators they had an opportunity to file an intervening petition for the purpose of having their rights protected in so far as those rights might be affected by any order made in Docket No.

15682. In the event the Commission entered an order which relators deemed to be unlawful because not protecting such rights, relators had the right and power under the law to bring an action in court to determine such rights. If this legal remedy has been lost, it has been lost through [fol. 236] the neglect, delay and refusal of relators to assert their legal rights, and not because of any action of the Interstate Commerce Commission in refusing to take jurisdiction to grant the relief which they had sought.

Nineteenth. Further answering relators' petition, intervener says that interveners' facilities in Kansas City, Missouri, were constructed in pursuance of ordinance of Kansas City No. 2336, which said ordinance was in evidence before the Commission in said case No. 15682, that said ordinance contemplated the use of said facilities by all of said twelve original parties to the operating agreement and their successors in interest under the terms of said operating agreement and required the acceptance of certain provisions of said ordinance by all of said companies parties to the operating agreement; that the city of Kansas City is not a party to said case No. 15682 and that the Interstate Commerce Commission has no power to make any order therein affecting the rights of the city of Kansas City.

Twentieth. Intervener further says that none of the admissions made by intervener as to the truth of facts alleged in the relators' petition are to be taken and considered as an admission that such facts are pertinent and relevant to the relief sought by relators in this cause. Intervener alleges that none of the facts, although admitted to be true, are relevant and that if true they do not constitute a basis upon which the Court could found a writ of mandamus.

Twenty-first. Intervener further says that the order of the Interstate Commerce Commission dismissing the intervening petitions of the relators in Docket No. 15682 was a negative order and is not subject to review by the courts in a proceeding of mandamus or otherwise.

Twenty-second. Further answering relators' petition, intervener alleges that by their petition relators seek to have this court authorize and direct the Interstate Commerce Commission to take jurisdiction to determine as to whether or not relators may remain proprietors of the Terminal

Company, through stock ownership, with all the rights and privileges growing out of that proprietorship, and at the same time permit them to avoid the terms of the contract under which they became proprietors. Intervener alleges that relators' petition amounts to a plea for reformation of the operating agreement and also a modification or nullification of said operating agreement and intervener fur- [fol. 237] ther alleges that the Interstate Commerce Commission has no power or jurisdiction to reform, modify, or nullify said operating agreement. Intervener further alleges that neither any paragraph of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920, nor any other provision of the Interstate Commerce Act, nor any other Act of Congress whatsoever, gives the Interstate Commerce Commission any power to modify, supersede, nullify, or ignore existing contracts between carriers in regard to the use of terminal facilities.

Further answering relators' petition, intervener alleges that if any paragraph of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920, or any other provision of the Interstate Commerce Act, or any other Act of Congress purported to give the Interstate Commerce Commission any such power, then such Act of Congress or provision thereof is unconstitutional and void and in violation of section 2 of Article III of the Constitution of the United States and the Fifth Amendment to the Constitution of the United States. Intervener further alleges that any order made by the Interstate Commerce Commission granting the petition of relators would operate to deprive intervener of its property without due process of law in violation of said provisions of the Constitution of the United States and is beyond the power and jurisdiction of the Interstate Commerce Commission.

Wherefore, the premises considered, intervener prays an order of this Court denying the writ of mandamus and dismissing the cause.

Respectfully submitted, Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C. Samuel W. Sawyer, 1900 Fidelity Bank Bldg., Kansas City, Mo. John H. Lathrop, 1900 Fidelity Bank Bldg., Kansas City, Mo. George O. Pratt, 1900 Fidelity Bank Bldg., Kansas City, Mo.

[fol. 238] *Duly sworn to by Samuel W. Sawyer. Jurat omitted in printing.*

In Supreme Court of District of Columbia

Demurrer to Answer—Filed June 22, 1933

* * * * * * *

Now comes The Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, relators herein, and demur to the answers filed herein by respondent, Interstate Commerce Commission, as amended, and by the interveners, Atchison, Topeka & Santa Fe Railway Company, Missouri Pacific Railway Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Kansas City Terminal Railway Company, and for cause of demurrer say that the answers of said respondent and said interveners are bad in substance.

For reasons for said demurrer, and the matters of law intended to be argued in support thereof, the relators assign the following:

1. The petition herein states a cause of action and the answers of respondent and interveners admit the essential allegations of said petition and make no material allegations of fact in contravention thereof.

2. Under the admitted facts the law requires that the Interstate Commerce Commission exercise the jurisdiction which it has heretofore failed and refused to exercise and that by failing and refusing to so exercise its said power and [fol. 239] jurisdiction, the said Commission has inflicted upon the relators an injury for which there is no adequate remedy other than a writ of mandamus from this Court requiring the said Commission to exercise its said jurisdiction.

F. H. Moore, Ralph M. Shaw, A. F. Smith, F. H. Towner, Attorneys for Relators.

Service of copy of the foregoing demurrer acknowledged this 22nd day of June, 1933.

H. L. Underwood, Attorney for Interstate Commerce Commission. E. A. Boyd, Attorneys for Interveners Atchison, Topeka & Santa Fe Railway Co. et al. Sam W. Sawyer, Attorneys for Intervener Kansas City Terminal Railway Co.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

* * * * * * *

JUDGMENT—June 23, 1933

This cause coming on to be heard upon the petition and the exhibits thereto attached, the answer of the respondent to said petition, as amended, and the answers of the interveners, and the demurrer of the relators to said answers, and upon consideration thereof it is ordered and adjudged, this 23rd day of June, 1933, that said demurrer be, and the same is hereby overruled.

Thereupon, the relators by their attorneys, electing to stand upon their demurrer, it is ordered that the petition herein be, and the same is hereby dismissed.

From the foregoing judgment the petitioners, by their attorneys, in open court, note an appeal to the Court of Appeals, which is hereby allowed upon the filing of bond for costs in the sum of $100, with leave to deposit the sum of $50 in cash, with the clerk in lieu thereof.

[fol. 240] MEMORANDUM

July 6, 1933.—$50 deposit by Gower in lieu of bond on appeal.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION OF COUNSEL ON APPEAL—Filed July 6, 1933

* * * * * * *

Be it remembered that on the 22nd day of June, A. D. 1933, before the Honorable Jesse C. Adkins, one of the Justices of said Court, this cause came on for hearing upon the pleadings heretofore filed herein.

Appearances: F. H. Towner, on behalf of Relators. H. L. Underwood, on behalf of Respondent. E. A. Boyd and S. W. Sawyer, on behalf of Interveners.

Whereupon, the following proceedings were had:

"Mr. Boyd: I ask the Court to permit the Missouri Pacific Railroad Company to be considered as a party to the petition of intervention and answer heretofore filed herein on behalf of The Atchison, Topeka and Santa Fe Railway Company, et al."

"Mr. Towner: I have no objection."

Whereupon, the following stipulation was entered into by counsel for the parties:

"It is agreed between the parties:

1. That the stock trust agreement referred — in Paragraph 5 of the petition herein and in Paragraph 2 of the answer of the Interstate Commerce Commission shall be considered as exhibit numbered 6 to the petition.

2. That the Commission agrees that the $50,000,000 worth of bonds referred to in Paragraph 4 of its answer was issued and sold by the Kansas City Terminal Railway Company, but that some of them were sold after the date of the Commission's report; that the Commission admits the truth of the allegations contained in Paragraph 8 of the petition with respect to the facts, circumstances and conditions subsequent to the making of this report and order of November 10, 1925, a disclaimer of which appears at the bottom of page 7 of the Commission's answer; that the Commission [fol. 241] admits the truth of the allegations contained in Paragraph 13 of the petition with respect to the use of the facilities of the Kansas City Terminal Railway Company subsequent to November 10, 1925, a disclaimer of which appears in the last sentence of the first paragraph on page 8 of its answer; that the Commission in so admitting is not to be understood as agreeing that the amount of use is the same but that the same basis of payment pertains as in 1925, that is, payments are made in the same proportion and percentages as originally, and by the same parties or their successors.

The foregoing admissions by the Commission are to be considered as amendments to its answer, but are not to be construed as admissions that the facts admitted are relevant to the case or competent or material for consideration in deciding it."

Whereupon, the cause was argued by counsel for the parties, after which the hearing in the above entitled matter was closed.

The foregoing statement of evidence is approved.

F. H. Towner, Attorneys for Relators. H. L. Underwood, Attorney for Respondent. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed July 6, 1933

* * * * * * *

Now come the Relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, and say that the Supreme Court of the District of Columbia erred herein in the following particulars, which, upon their appeal to the Court of Appeals of the District of Columbia, said relators assign as errors:

[fol. 242] (1) The Court erred in failing to hold that the Interstate Commerce Commission, under Paragraphs (1), (3) and (4) of Section 3 of the Act to Regulate Commerce, had the jurisdiction contended for herein.

(2) The Court erred in failing to hold that the said Commission, in its report of November 10, 1925, made in its Docket 15682, denied that it had the jurisdiction contended for herein under said Paragraphs (1), (3) and (4) of said Section 3 of the Act to Regulate Commerce.

(3) The Court erred in failing to hold that relators were entitled to the writ of mandamus prayed for herein and in refusing to issue said writ.

(4) The Court erred in holding that relators were not entitled to the writ of mandamus prayed for herein; in overruling the demurrer filed by relators to the answers of respondent and interveners, and in dismissing the petition of relators.

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Attorneys for Relators.

Service of the above assignment of errors is hereby acknowledged this 5th day of July, 1933.

H. L. Underwood, Attorney for Interstate Commerce Commission. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

In Supreme Court of District of Columbia

Designation of Record—Filed July 6, 1933

* * * * * * *

Relators, having perfected an appeal herein to the Court of Appeals of the District of Columbia, hereby request the Clerk of the Supreme Court of the District of Columbia to prepare a transcript of the record on appeal including therein the following papers and proceedings, to-wit:

(1) Original petition and Exhibits 1, 2, 3, 4, 5 and 6; Exhibits 1 to 5, inclusive, being attached thereto, and Exhibit [fols. 243 & 244] 6 being stipulated upon the hearing herein as appears from the statement of evidence.

(2) Rule to show cause.

(3) Answer of Interstate Commerce Commission.

(4) Petition of The Atchison, Topeka and Sante Fe Railway Company, et al., for leave to intervene as respondents, and order entered thereon.

(5) Answer of The Atchison, Topeka and Santa Fe Railway Company, et al.

(6) Petition of Kansas City Terminal Railway Company for leave to intervene as a respondent, and order entered thereon.

(7) Answer of Kansas City Terminal Railway Company.

(8) Demurrer of relators to answers of Interstate Commerce Commission and interveners The Atchison, Topeka and Santa Fe Railway Company, et al.

(9) Stipulation of Counsel on appeal.

(10) Any opinion of the Court filed herein.

(11) Order overruling demurrer of relators dismissing petition and allowing appeal.

(12) Assignment of errors.

(13) This designation.

F. H. Towner, Attorney for Relators.

Service of the above designation is hereby acknowledged, this 5th day of July, 1933.

H. L. Underwood, Attorney for Respondent. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 245] Thursday, April 5th, A. D. 1934.

* * * * * * *

No. 6068

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al.

The argument in the above entitled cause was commenced by Mr. A. F. Smith, attorney for appellants, and was continued by Mr. E. M. Reidy, attorney for the Interstate Commerce Commission and by Mr. Samuel W. Sawyer, attorney for the Kansas City Terminal Railway Company, and was concluded by Mr. Frank H. Towner, attorney for appellants.

[fol. 246] COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6068

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al., Appellees

Appeal from the Supreme Court of the District of Columbia

(Argued April 5, 1934. Decided May 7, 1934)

A. F. Smith, of Kansas City, Mo., F. H. Towner, of Chicago, Ill., and George E. Hamilton, John J. Hamilton,

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George E. Hamilton, Jr., and Henry R. Gower, all of Washington, D. C., for appellants.

Daniel W. Knowlton, H. L. Underwood, and E. M. Reidy, all of Washington, D. C., for Interstate Commerce Commission, appellee.

E. A. Boyd, of Chicago, Ill., and Lawrence H. Cake, of Washington, D. C., for Atchison, Topeka and Santa Fe Railway Company, et al., appellees.

Samuel W. Sawyer, of Kansas City, Mo., and Lawrence H. Cake, of Washington, D. C., for Kansas City Terminal Railway Company, appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

GRONER, Associate Justice:

This is an appeal from a judgment denying a petition for mandamus. The history of the controversy goes back more than a quarter of a century. Boiled down it is this: In 1906 a Missouri corporation was organized for the purpose of acquiring, constructing, and operating a union station and terminal facilities in Kansas City, Missouri-Kansas. Ten railroad companies operating lines of railroad entering into or passing through Kansas City agreed to use the facilities of the terminal company. An operating agreement was entered into in 1909, and the next year appellants, Chicago Great Western R. R. Company and the Kansas City Southern Ry. Company, who were not among the original ten, became parties to the agreement to the same extent and in the same manner as the others. The terminal company acquired lands and rights of way neces- [fol. 247] sary to the accomplishment of the enterprise, and, some time after the agreement, the terminal was completed. The contract provided for equal ownership, equal control, and equal privileges in the use of the property as between the signatory companies. Each of the twelve railroads paid for $183,333.33 of stock in the terminal company, which was all of the stock issued. The agreements provided for the admission of other railroads in the use of the properties and facilities, each of the companies having an equal voice and vote in the matter of the admittance of other railroads. The terminal company issued and sold $50,000,000 of bonds secured by mortgage or deed of trust

on the property, each of the roads agreeing to pay an equal proportion of taxes and of interest on bonds. The stock of the terminal company owned by each of the railroad companies was deposited with a trustee. It was agreed that if any owning company should default in the payment of its share of the taxes, or principal or interest, such defaulted sum should be paid by the nondefaulting companies in equal parts. All other expenses, such, for instance, as maintenance, transportation expenses, and salaries and wages, were to be paid by the owning companies on a user basis. One of the parties to the agreement was the Missouri, Kansas and Texas Railway Company. In 1915 it was placed in the hands of receivers. The receivership was followed by a decree of foreclosure entered by the Federal court for the Eastern District of Missouri. The decree (of sale) provided that the purchaser might within a year from the date of the delivery of deeds and taking possession of the property, elect to adopt or reject any executory contract to which the old company was a party. The purchaser organized a corporation under the name of Missouri-Kansas-Texas Railroad Company to take over and operate the property purchased, and this company duly filed its election not to adopt the agreement of its predecessor company with relation to the terminal property, and then, being without terminal facilities in Kansas City, petitioned the Interstate Commerce Commission for an order pursuant to the provisions of paragraph 4 of section 3 of the Interstate Commerce Act (49 U. S. C. A. sec. 3 (4)) to accord it the right to use a designated portion of the terminal on an equitable basis, i.e., a basis on which compensation would be figured on the extent of the use. The Commission issued a temporary order effective April 1, 1924, permitting the new company for the time being to use the terminals upon the terms and provisions of the operating agreement and for the compensation therein provided, reserving for future determination the final measure of compensation for use during the period the service order should be in effect. The Commission gave the petition its docket number 15,682. The eleven other railroad companies filed intervening petitions before the Commission and participated in the proceedings. Some of the interveners, including appellants, sought to obtain the same relief as to terms that was sought by the petitioner (M. K. T. R. R. Co.). In due time the Commission

heard and considered the petition. At the time of rendering its decision (1925) a suit was pending in the Federal court in Missouri, the object of which was to have the court decree the Missouri-Kansas-Texas Railroad Company (the petitioner) bound by the terminal operating agreement entered into by its predecessor company, and the decision of the Commission noted the pendency of this proceeding and [fol. 248] held that if the new company should be adjudged to be bound by the operating agreement the relief prayed for could not be granted, and, if adjudged not to be bound, a subsequent order would be entered in accordance with the provisions of the Act, but the Commission construed the Act and held as to interveners (appellants) that the provisions relied upon were not sufficiently broad to authorize the Commission to grant the relief asked and dismissed the interventions.

After the Commission had filed its report (November 10, 1925) just above referred to, nothing more was done until 1931. In that year Missouri-Kansas-Texas Railroad (having in the meantime been successful in sustaining in the court proceeding its right to reject the contract of its predecessor company as to the terminal property) and these appellants each separately filed petitions with the Commission, the former to have determined the amount of compensation which it should pay under the provisions of section 3 (4) of the act for the use of the terminal facilities and the latter for a rehearing upon the order dismissing the intervening petitions. The Commission about the middle of 1931 denied a rehearing to interveners (appellants), and in 1933 this proceeding was begun by petition for a writ of mandamus to compel the Commission to set aside its order of November 10, 1925 (and also its order of June 1, 1931, denying interveners a rehearing). The Commission answered the petition and appellants filed a demurrer to the Commission's answer. The court below overruled the demurrer, and appellants electing to stand thereon, entered an order denying mandamus but allowing an appeal to this court.

We have, therefore, here a case in which twelve railroad companies operating to and through Kansas City enter into an agreement for the construction of joint freight and passenger terminal facilities with the right to all to use the same on equal terms for a period of 200 years. Each of

the companies subscribed to and paid for one twelfth of the total capital stock of the terminal company. After the terminal was completed that company operated in excess of 172 miles of track and reached 208 industries with its rails, and performed switching services for the user lines and for the industries. The cost of the terminal was ascertained at the time of completion to be in the neighborhood of $50,000,000. The interest on this amount and the taxes on the property the agreement divided equally among the twelve users and stockholders, that is to say, each company paid one twelfth of the aggregate of the items, interest and taxes, and assumed an equal and ratable liability for the payment of the principal. For this each railroad was entitled to equal operating rights for both its freight and passenger trains. The other charges in connection with the operation of the terminals, such as maintenance and operating expenses, were to be accounted for and assessed against each line in the proportion which its use of the facilities and tracks bore to the total use by it and the other lines. Detailed provisions were made with relation to the apportionment of these expenses, and no point is made that these were not fair and reasonable. The single point at issue involves the provisions of the agreement requiring each of the railroads to pay one twelfth of the taxes and one twelfth of the interest accruing on the terminal com-
[fol. 249] pany's bonds. Appellants and some of the smaller railroads, which, like themselves, use the terminal facilities, trackage, etc., far less extensively than some of the larger roads, consider the provision referred to inequitable and burdensome and insist upon a division of all charges upon a user basis. On the other hand, the larger railroads, while admittedly using the facilities to a greater extent, oppose any change in the contract basis. They tell us the Commission has no power to set aside the provisions of the contract, and they also say that, even if it has, the enforcement of the power would have calamitous consequences not only to the terminal in question but to other projects of a like kind. They point out that the operating agreement has been assigned as additional security for the bonds and that it was the agreement of all the lines to be equally bound that made the bonds attractive and induced investment in them, and, finally, that it is not the province or the duty of the Commission to save appellants from their own improvidence.

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With this view of the situation, we turn to the sections of the Interstate Commerce Act which appellants invoke as authorizing and requiring the Commission to do the things they ask. They are paragraphs 1 and 3 of section 3 of the Interstate Commerce Act, and paragraph 4 which was added to section 3 by the Transportation Act of 1920 (49 U. S. C. A. sec. 3 (1) (3) (4)), as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such

terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose [fol. 250] terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

In respect to appellants' argument as to the applicability of paragraphs 1 and 3, the Commission says in its report:

"Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property.

Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3)."

And as to paragraph (4) the Commission says:

"The paragraph above quoted [sec. 3 (4)] empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier 'owning or entitled to the enjoyment of terminal facilities' to handle its own business, to require the use of the facilities by 'another carrier' or 'other carriers' upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to 'require the use' of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then 'owning or entitled to the enjoyment' of the facilities and for the benefit of 'another carrier' or 'other carriers'; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

"Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to [fol. 251] the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. * * * Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph."

These two quotations from the lengthy report of the Commission, which in the interest of clarity we think it proper to set out as fully as we do, sufficiently explain the

ground on which the Commission based its refusal to grant the relief asked. The Commission, no less than ourselves, was impressed with the hardship inherent in the case, for in its report it says: "This case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through the past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions." This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result. Appellant's use of the terminals now and for some years has averaged less than 3 per cent of the total use, whereas their contribution to the payment of interest and taxes is 8⅓ per cent. In dollars and cents each of the twelve railroads paid in the year 1932 on account of interest and taxes approximately $200,000. Had these charges been divided on a user basis, some of the larger roads would have paid approximately $600,000 and appellants only a little more than $50,000. This is so because some of the smaller roads use the terminals for a single passenger train a day whereas some of the larger roads operate from fifteen to twenty. No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt.

The Commission, we think, share this view, and it is clear would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action. But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is

[fol. 252] in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that "the power and authority thus invoked are not conferred by the quoted paragraph [the statute]", and again, "we are unable to find the requisite power or authority in any other provision of the act", and "we are unable to spell out from that provision such a jurisdiction." These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. L. & N. R. R. v. Mottley, 219 U. S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an adminis-

trative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. The States are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation.

In the petition which appellants filed with the Commission they ask for an investigation of the terminal situation and that the Commission thereafter provide for the use of the terminal by all the railroads on a fair and equi- [fol. 253] table basis. They support the petition by reference to a statute which on the one hand makes it unlawful for a common carrier to give any undue or unreasonable preference to any person, firm, or corporation, and, on the other, authorizes the Commission to require a railroad company to divide its terminal facilities with another. They insist that the provisions are broad enough to require the Commission to modify the terms of the contract and provide a use of the terminals on a different basis of compensation, because, as they claim, the contract they had made for themselves imposed in its operations burdens which in the public interest they should not be required to discharge, and they rely upon L. & N. R. R. v. Mottley, supra, to sustain their position.

But even if we should think the statute may be so construed, it does not follow that this court or any other court can require the Commission to decide the question in that way when it has considered the matter and announced that its own judgment is opposed to that interpretation. In that case its interpretation, right or wrong, is the exercise of judgment and discretion—impregnable to mandamus. If what the Commission had done was to refuse to hear

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the case made by petitioner, or, having heard it, refuse to carry out the plain mandate of the statute, as was the case in Roberts v. U. S., 176 U. S. 221, mandamus would be the proper remedy, but that is not this case, for the Commission did not refuse to hear and to decide; it did both, and an examination of the provisions relied on clearly may not be said by anyone, when considered in the light of appellants' claims, to disclose a positive command. Wilbur v. U. S., 281 U. S. 206, 218-19. The mistake appellants make is that they construe the refusal of the Commission to find in the act authority to do the thing appellants pray may be done, as denial of jurisdiction, whereas the fact is the Commission assumed jurisdiction, heard the evidence, and reached the conclusion that on the facts shown no relief could be given under the provisions of the applicable laws. That this was the construction of a statute is obvious; that the statute from appellants' point of view is not free from doubt is equally obvious; and that action in such circumstances cannot be controlled by mandamus is settled law.

In this view, it follows, without regard to what we may think of the equities, or even whether we would have construed the statute differently, we are without jurisdiction in this proceeding to change the result. The action of the Commission was judicial, and, as the Supreme Court said very recently in a case from us, "errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." I. C. C. v. U. S., 289 U. S. 385, 393.

The judgment of the Supreme Court of the District is affirmed.

Affirmed.

HITZ, concurring:

I concur in the judgment of the court in this case, but not in all the far-reaching statements and implications of the opinion.

It seems to me clear that the Interstate Commerce Commission took jurisdiction of the questions presented; considered them at length; and decided them by a much divided vote, from which decision so reached no writ of mandamus lies to require a contrary decision.

[fol. 254] But the opinion of the court asserts that the contract seriously impairs the ability of the smaller roads to operate their properties satisfactorily, and I feel constrained to dissent from the view—though based on the Ordinance for the Northwest Territory and the other authorities cited—that a common carrier subject to the provisions of these statutes may contract itself out of the power of the Commission by an arrangement involving so much of its revenue and covering so long a time as to impair or destroy its power to perform its public obligations.

A true copy. Teste:

—— ——, Clerk, Court of Appeals. D. C.

[fol. 255] Monday, May 7th, A. D. 1934.

* * * * * * *

No. 6068, April Term, 1934

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al.

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

May 7, 1934.

Concurring, Mr. Justice Hitz.

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[fol. 256] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6068

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry of argument.
3. Opinion of the Court of Appeals.
4. Judgment (or decree) of the Court of Appeals.
5. This designation of record.
6. Clerk's certificate.

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Counsel for Appellants.

[fol. 257] [Endorsed:] No. 6068. In the United States Court of Appeals for the District of Columbia. The United States of America ex rel. Chicago, Great Western Railroad Company et al., Appellants, vs. Interstate Commerce Commission, et al., Appellees. Designation of Record. United States Court of Appeals for the District of Columbia. Filed Jul. 13, 1934. Henry W. Hodges, Clerk.

[fol. 258] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the United States Court of Appeals for the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 257 inclusive, constitute a true copy of the tran-

script of record and proceedings of said Court of Appeals, as designated by counsel in the case of The United States of America ex rel. Chicago Great Western Railroad Company and the Kansas City Southern Railway Company, et al., Appellants, vs. Interstate Commerce Commission, Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company, et al., No. 6068, April Term, 1934, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 13th day of July, A. D. 1934.

Henry W. Hodges, Clerk of the United States Court of Appeals for the District of Columbia; by Moncure Burke, Deputy Clerk. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 259] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such wit.

Mr. Justice Brandeis took no part in the consideration or decision of this application.

Endorsed on cover: File No. 38,862. U. S. Court of Appeals, District of Columbia. Term No. 234. The United States of America ex rel. Chicago Great Western Railroad Company et al., Petitioners, vs. Interstate Commerce Commission, Atchison, Topeka and Sante Fe Railway Company, et al. Petition for a writ of certiorari and exhibit thereto. Filed July 28, 1934. File No. 234, O. T., 1934.